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No. 07-886

In The

Supreme Court of the United States

STATE OF IOWA,

Petitioner,

vs.

JAMES HOWARD BENTLEY,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Iowa

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a child's report of sexual abuse to a hospital counselor is "testimonial" for purposes of the Confrontation Clause if the statements are made during an interview which serves both therapeutic and investigatory purposes.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 7

A. Lower courts are divided on the question whether a child's report of abuse to someone other than a police officer is "testimonial." 8

B. A pressing need exists for the Supreme Court to dispel the lower courts' confusion over what legal tests may be derived from *Crawford* and *Davis* to determine the testimonial nature of children's statements 11

1. The decision of the Iowa Supreme Court conflicts with the decisions of other state supreme courts which try to apply or adapt the "primary purpose" test articulated in *Davis* 12

2. The decision of the Iowa Supreme Court conflicts with the decisions of other state supreme courts which take into account the reasonable expectations of the child declarant 17

C. This case poses a question of fundamental importance to a nationwide system of Children's Advocacy Centers 25

TABLE OF CONTENTS – Continued

Page

D. This case presents an excellent vehicle for clarifying the definition of "testimonial" as applied to child witnesses 28

CONCLUSION 31

INDEX TO APPENDICES

APPENDIX A — Opinion of the Iowa Supreme Court, *State v. Bentley*, 739 N.W.2d 296 (Iowa 2007) ..... App. 1

APPENDIX B — Ruling on Evidentiary Motions entered on June 12, 2006 (Judge Denver D. Dillard) ..... App. 17

APPENDIX C — Ruling entered on May 20, 2005 (Judge Thomas L. Koehler) ..... App. 39

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Bourjaily v. United States, 483 U.S. 171 (1987).....24

Crawford v. Washington, 541 U.S. 36 (2004).....*passim*

Davis v. Washington, 547 U.S. ___, 126 S. Ct. 2266 (2006).....*passim*

Michigan v. Long, 463 U.S. 1032 (1983).....29

United States v. Bordeaux, 400 F.3d 548 (8th Cir. 2005).....9

United States v. Coulter, 62 M.J. 520 (N.M. Ct. Crim. App. 2005).....20

United States v. Cromer, 389 F.3d 662 (6th Cir. 2004).....17

United States v. Hendricks, 395 F.3d 173 (3rd Cir. 2005).....17

United States v. Peneaux, 432 F.3d 882 (8th Cir. 2005).....10, 14

United States v. Saget, 377 F.3d 223 (2nd Cir. 2004).....17

United States v. Summers, 414 F.3d 1287 (10th Cir. 2005).....17

STATE CASES

Commonwealth v. Allshouse, 924 A.2d 1215 (Pa. Super. 2007).....14

In re D.L., 2005 WL 1119809 (Ohio App. 2005).....21

Foley v. State, 914 So. 2d 677 (Miss. 2005).....14

TABLE OF AUTHORITIES – Continued

Page

Hernandez v. State, 946 So. 2d 1270 (Fla. App. 2007) 10, 16

Lagunas v. State, 187 S.W.3d 503 (Tex. App. – Austin 2005) 8, 20

L.J.K. v. State, 942 So. 2d 854 (Ala. Crim. App. 2005) 10

Lollis v. State, 232 S.W.3d 803 (Tex. Ct. App. – Texarkana 2007) 14

People v. Geno, 683 N.W.2d 687 (Mich. Ct. App. 2004) 10

People v. Sharp, 155 P.3d 577 (Colo. App. 2006) 10

People v. Sisavath, 13 Cal. Rptr. 3d 753 (Cal. App. 5 Dist. 2004) 10, 23, 27, 30

People v. Stechly, 870 N.E.2d 333 (Ill. 2007) 9, 19, 22

People v. Vigil, 127 P.3d 916 (Colo. 2006) 10, 18, 22

Rangel v. State, 199 S.W.3d 523 (Tex. App. – Fort Worth 2006) 10, 16

In re S.R., 920 A.2d 1262 (Pa. Super. 2007) 10, 26

State v. Alvarez, 143 P.3d 668 (Ariz. App. 2006) 18

State v. Bentley, 739 N.W.2d 296 (Iowa 2007) ..... *passim*

State v. Blue, 717 N.W.2d 558 (N.D. 2006) 10, 16

State v. Bobadilla, 709 N.W.2d 243 (Minn. 2006) 11, 13, 21

State v. Brigman, 615 S.E.2d 21 (N.C. App. 2005) 21

TABLE OF AUTHORITIES – Continued

Page

State v. Buda, 912 A.2d 735 (N.J. Super. A.D. 2006) 16

State v. Dezee, 125 Wash. App. 1009, 2005 WL 246190 (Wash. Ct. App. 2005) 21

State v. D.H., 2007 WL 3293361 (Ohio Ct. App. 2007) 10

State v. Edinger, 2006 WL 827412 (Ohio Ct. App. 2006) 11, 30

State v. Foreman, 157 P.3d 228 (Or. App. 2007) 11

State v. Henderson, 160 P.3d 776 (Kan. 2007) 15, 20, 22

State v. Hooper, ___ P.3d ___, 2006 WL 2328233 (Idaho App. 2006) 10, 18, 23

State v. Jensen, 727 N.W.2d 518 (Wis. 2007) 19

State v. Justus, 205 S.W.3d 872 (Mo. 2006) 10, 16, 22

State v. Krasky, 736 N.W.2d 636 (Minn. 2007) 8, 9, 10, 13

State v. Mack, 101 P.3d 349 (Or. 2004) 11, 22

State v. Mason, 162 P.3d 396 (Wash. 2007) 18

State v. Pitt. 147 P.3d 940 (Or. App. 2006) 10

State v. Scacchetti, 711 N.W.2d 508 (Minn. 2006) 10, 13

State v. Siler, 876 N.E.2d 534 (Ohio 2007) 18, 22

State v. Snowden, 867 A.2d 314 (Md. 2005) 9, 23, 26

State v. Vaught, 682 N.W.2d 284 (Neb. 2004) 14

TABLE OF AUTHORITIES – Continued

Page

DOCKETED CASE

Krasky v. Minnesota, Sup. Ct. No. 07-7390 30

FEDERAL CONSTITUTION

U.S. Const., Amend. VI ..... *passim*

FEDERAL STATUTE

28 U.S.C. § 1257(a) 1

STATE STATUTE

Iowa Code § 915.35 26

OTHER AUTHORITIES

Amy Russell, *Best Practices in Child Forensic Interviews: Interview Instructions and Truth-Lie Discussions*, 28 Hamline Journal of Public Law and Policy 99 (2006) 27

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TABLE OF AUTHORITIES – Continued

Page

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Richard D. Friedman, *Crawford, Davis, and Way Beyond*, 15 J.L. & Policy 553 (2007).....19

U.S. DOJ, Law Enforcement Response to Child Abuse, http://www.ncjrs.gov/pdffiles/162425.pdf..... 25

OPINIONS BELOW

The Iowa Supreme Court's opinion is reported as *State v. Bentley*, 739 N.W.2d 296 (Iowa 2007) and is attached at Appendix pages 1-16. The two trial court rulings are unpublished and attached at Appendix pages 17-61.

JURISDICTION

The Iowa Supreme Court issued its decision on September 28, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . .

STATEMENT OF THE CASE

This case exemplifies the quandary faced by state courts trying to apply *Crawford v. Washington*, 541 U.S. 36 (2004) and *Davis v. Washington*, 547 U.S. ___, 126 S. Ct. 2266 (2006) to statements made by child victims in settings which mix therapeutic and investigative purposes.

1. In January of 2004, a child psychiatrist diagnosed the victim, J.G., with depression, oppositional defiance disorder, and attention deficit hyperactivity disorder. During 2004, she was hospitalized three times, once following a suicide attempt. On November 16, 2004, J.G. was an in-patient in the juvenile psychiatric ward at St. Luke's Hospital in Cedar Rapids, Iowa when she participated in a videotaped interview at the hospital's Child Protection Center. Hearing Tr. (5-31-06) at 68.

St. Luke's Child Protection Center is affiliated with a network of more than 600 centers advocating for abused children located in all 50 states. The purpose of the center is to provide suspected victims of child abuse with centralized access to services, including medical examinations and psychosocial assessments. The center features a multi-disciplinary team, which includes a physician, the hospital counselor, a Department of Human Services assessment worker and a police officer.

J.G. was 10 years old at the time of the interview, but an expert placed her developmental age at seven or a bit younger. Hearing Tr. (5-31-06) at 77, 81-82. During the interview, J.G. alleged that the respondent molested her starting when she was eight years old and continuing over the course of two years.

Hospital counselor Roseanne Matuszek conducted the interview in a room designed to put children at ease. Cedar Rapids police officer Ann Deutmeyer and state Department of Human Services

worker Pam Holtz, who arranged for the interview, observed through a two-way mirror. Neither ever spoke with J.G. Hearing Tr. (5-31-06) at 14-15. Ms. Matuszek told J.G. that "Pam" from DHS and "Ann" from the police department were watching, but said they were "just going to listen to us talk and are not going to come in here and bother us." J.G. did not appear fazed by learning of their presence, indeed, she casually picked her nose as the interviewer explained the arrangement. The counselor also made J.G. aware that the interview was being recorded.

As the counselor started to tell J.G. that the room was a "safe place for boys and girls to come talk to me" and that "you can say anything in this room and you're not going to get into trouble," J.G. volunteered: "the reason why I'm acting this way is because I've been molested." Hearing Tr. (5-31-06) at 65. When Ms. Matuszek asked how J.G. had been acting, the girl explained: "throwing the fits." The counselor also advised J.G. that it was important to tell the truth and not "make up stories." J.G. interrupted to say she was "not lying." State's Exhibit 2 (Videotape).

During the 40-minute videotaping, J.G. revealed that James Bentley, her mother's former boyfriend, had rubbed his penis against her buttocks while bathing with her, had photographed her posed naked with her legs spread apart, had "licked" her vagina, and "played sex" with her by climbing on top of her and sliding his penis between her closed legs, using "spit" for lubrication. J.G. said Bentley would go "up

and down, up and down" on top of her. State's Exhibit 1 (Patient Interview Report).

When Ms. Matuszek asked near the end of the session whether J.G. was worried about anything, J.G. responded: "I'm worried about me throwing fits." State's Exhibit 2. At no point during the interview did the counselor or J.G. mention anything about J.G.'s statements being used for prosecutorial purposes or any possibility that Bentley could be punished for what he did to her. Hearing Tr. (5-31-06) at 56.

After her interview, J.G. went for a medical examination. Then the child protection team – composed of the counselor, the physician, the child protection worker and the police officer – met to develop recommendations. The team recommended that the girl undergo sexual abuse counseling and have no contact with James Bentley. State's Exhibit 1 (Patient Interview Report). They left any further action to the department of human services and the police.

2. As a result of J.G.'s allegations, the State filed trial informations charging Bentley with two counts of sexual abuse in the second degree for engaging in sex acts with a child under the age of 12. A few months after the charges were filed and before J.G. could testify, Bentley's brother kidnaped, raped and killed her. The record does not reveal direct involvement by respondent in the victim's murder.

In April of 2005, the respondent sought a preliminary determination of whether J.G.'s videotaped

interview would be admissible under the Confrontation Clause. On May 20, 2005, the district court ruled the victim's videotaped statements would be admissible in the sexual abuse trials. The trial judge found J.G.'s statements were not testimonial under *Crawford v. Washington*, 541 U.S. 36 (2004) because the government's involvement in the interview was "peripheral" and "the circumstances surrounding the interview suggest that a child of J.G.'s age would not reasonably believe that her disclosures to Ms. Matuszek would be available to use at a later trial." Appendix pages 39-54.

After unsuccessfully seeking interlocutory review to the Iowa Supreme Court, the respondent, represented by new counsel, asked the district court to reconsider the Confrontation Clause issue. A different judge excluded J.G.'s statements, finding they were "testimonial" because the counselor was acting as a "surrogate" for the police during the hospital interview. Appendix pages 17-38. The State sought discretionary review, asserting that without J.G.'s videotaped statements the prosecution could not realistically go forward. The Iowa Supreme Court granted review.

3. The Iowa Supreme Court affirmed the district court's determination that admission of J.G.'s statements would violate the Confrontation Clause. In doing so, the Iowa court found it "unnecessary" to analyze the purpose of the statements from the child declarant's perspective.

The state court chronicled the "close, ongoing relationship" between the center and local law enforcement. Appendix pages 7-10. The court noted the child protection worker and police officer arranged J.G.'s interview and watched through an observation window. Appendix pages 7-8. The court pointed out the hospital counselor took a break toward the end of the interview to ask the observers whether she "forgot" to ask any questions. Appendix page 9. However, nothing the counselor asked after the break elicited any further information from J.G.

The Iowa Supreme Court praised the St. Luke's center for performing "very important and laudable services in furtherance of the protection of children." Appendix page 14. The Iowa court described the comfortable setting of the interview room and acknowledged: "It is beyond dispute that information gathered from J.G. in such a child-friendly, safe environment could have been very useful in the treatment of her well-documented psychological conditions. The work of the CPC and the team of professionals who took J.G.'s statement is not impugned by our characterization of J.G.'s statements as 'testimonial.'" Appendix page 14.

The state supreme court recognized that "one of the significant purposes of the interrogation was surely to protect and advance the treatment of J.G.," but the court did not venture to determine the "primary purpose" of the interview. The state court instead held that "the extensive involvement of police in the interview rendered J.G.'s statements

testimonial." Appendix pages 14-15. Petitioner now seeks review of the state supreme court's decision.

REASONS FOR GRANTING THE WRIT

When the Court adopted the new "testimonial" framework for analyzing the admissibility of statements under the Sixth Amendment's Confrontation Clause in *Crawford v. Washington*, 541 U.S. 36 (2004), it declined to provide a comprehensive definition of "testimonial" statements. *Crawford's* narrow approach engendered a pressing need for more guidance as to what was covered by the new rule.

Questions abounded concerning the impact of the new framework on two specialized fields of criminal prosecution: domestic violence and child abuse. In both fields, circumstances often prevent victims from testifying at trial, leaving prosecutors to prove their cases largely through out-of-court statements. In *Davis v. Washington*, 547 U.S. ___, 126 S. Ct. 2266 (2006), the Court defined the parameters of the Confrontation Clause for two common domestic violence scenarios: 911 calls and on-the-scene questioning by law enforcement. *Davis,* however, purposely did little to clarify issues surrounding child abuse prosecutions.

During the nearly four years since the Court decided *Crawford,* the question of when a child's report of abuse should be considered testimonial has percolated among the lower courts. "Courts around

the nation have struggled with the application of *Crawford* to child witnesses. . . . " *Lagunas v. State*, 187 S.W.3d 503, 519 (Tex. App. – Austin 2005) (describing its task of deciding whether a child's statement was testimonial as "attempting to hit a 'moving target.'"). The struggle of the lower courts to apply *Crawford* and *Davis* to reports of abuse by children has produced divergent results based on varying rationales. The confusion will only be dispelled when the Supreme Court clarifies the legal test to apply to children's statements.

A. Lower courts are divided on the question whether a child's report of abuse to someone other than a police officer is "testimonial."

In the wake of *Crawford* and *Davis*, state courts have reached conflicting decisions concerning the "testimonial" nature of children's statements. The decisions especially diverge when the children are speaking to adults who are not police, but who intend both to assess the child's health and welfare and to share the information with investigators. Interviewers working for multi-disciplinary Children's Advocacy Centers epitomize this dual role.

The sharpness of the conflict is best illustrated by the opposite positions taken on this question by the supreme courts in the neighboring states of Iowa and Minnesota. In both *State v. Bentley*, 739 N.W.2d 296 (Iowa 2007) and *State v. Krasky*, 736 N.W.2d 636 (Minn. 2007), the child declarants were assessed at a

hospital rather than a police station; both children were referred to the assessment center by social services and law enforcement; both children were interviewed by an employee of the hospital and not a government actor (though in *Bentley* an officer watched the interview through an observation window while in *Krasky* police were not present); both interviews were videotaped; both interviewers recommended sexual abuse counseling after hearing the children's reports of abuse; and both children were unavailable at the time of trial. Despite these many similarities, the two courts reached contrary conclusions concerning the testimonial nature of the children's statements. In Minnesota, the child's statements may be used at trial without violating the defendant's Confrontation Clause rights. But across Minnesota's southern border in Iowa, the offender charged with raping the child may avoid prosecution because the child's voice cannot be heard at trial. It is very difficult to reconcile these results. The conflict cannot be resolved without a decision of this Court.

The split is not limited to Iowa and Minnesota. In deciding *Bentley*, the Iowa Supreme Court joined one federal circuit court of appeals and four other state courts of last resort, which have read *Crawford* to exclude the statements of an unavailable child witness as "testimonial" under the Confrontation Clause when they were made to a private interviewer at a children's advocacy center. *See United States v. Bordeaux*, 400 F.3d 548 (8th Cir. 2005); *People v. Stechly*, 870 N.E.2d 333 (Ill. 2007); *State v. Snowden*, 867 A.2d

314 (Md. 2005); *State v. Justus*, 205 S.W.3d 872 (Mo. 2006); *State v. Blue*, 717 N.W.2d 558 (N.D. 2006). Eight intermediate state appellate courts also have found that statements made to a member of a multi-disciplinary team were "testimonial." *See L.J.K. v. State*, 942 So.2d 854 (Ala. Crim. App. 2005); *People v. Sisavath*, 13 Cal. Rptr. 3d 753 (Cal. App. 5 Dist. 2004); *People v. Sharp*, 155 P.3d 577 (Colo. App. 2006); *Hernandez v. State*, 946 So.2d 1270 (Fla. App. 2007); *State v. Hooper*, ___ P.3d ___, 2006 WL 2328233 (Idaho App. 2006); *State v. Pitt*, 147 P.3d 940 (Or. App. 2006); *In re S.R.*, 920 A.2d 1262 (Pa. Super. 2007); *Rangel v. State*, 199 S.W.3d 523 (Tex. App. – Fort Worth 2006).

On the other side of the split are two state courts of last resort which have decided that a child's statements to a private actor who was a member of a child abuse assessment team were nontestimonial. *See People v. Vigil*, 127 P.3d 916 (Colo. 2006); *State v. Krasky*, 736 N.W.2d 636 (Minn. 2007); *State v. Scacchetti*, 711 N.W.2d 508 (Minn. 2006). The Eighth Circuit Court of Appeals also decided that a child's statements to a physician who worked with a children's advocacy center were nontestimonial when no "forensic interview" preceded the meeting with the physician. *United States v. Peneaux*, 432 F.3d 882, 895-96 (8th Cir. 2005). Three other intermediate state appellate courts have decided that children's statements to private actors who worked within the child assessment team were nontestimonial. *See People v. Geno*, 683 N.W.2d 687 (Mich. Ct. App. 2004); *State v.*

D.H., 2007 WL 3293361 (Ohio Ct. App. 2007); *State v. Edinger*, 2006 WL 827412 (Ohio Ct. App. 2006); *State v. Foreman*, 157 P.3d 228 (Or. App. 2007).

Even outside the context of child assessment centers, state courts of last resort differ on the question whether children's statements to government-employed child protection workers must be viewed as testimonial. *Compare State v. Bobadilla*, 709 N.W.2d 243 (Minn. 2006) (holding neither government questioner nor three-year-old declarant were acting to produce statement for trial) *with State v. Mack*, 101 P.3d 349 (Or. 2004) (three-year-old victim's statements to Department of Human Services worker were testimonial because worker was "proxy" for police).

Because *Crawford* and *Davis* provide insufficient guidance on how to determine if children's reports of abuse are testimonial, the division among the lower courts does not promise to correct itself.

B. A pressing need exists for the Supreme Court to dispel the lower courts' confusion over what legal tests may be derived from *Crawford* and *Davis* to determine the testimonial nature of children's statements.

The inconsistency among the analyses applied by lower courts to determine whether children's statements are testimonial is even greater than the split in outcomes. *Crawford* and *Davis* were purposely incremental in defining "testimonial." Lower courts have filled the doctrinal void with idiosyncratic tests

to gauge which statements by children are the equivalent of in-court testimony. The variation in those legal tests trains on two questions: (1) can the "primary purpose" language in *Davis* be transported to the context of child abuse reports? and (2) how does the language in *Crawford* concerning the reasonable expectations of the declarant apply to statements made by young children? The divergent treatment of these two inquiries further demonstrates why it is necessary for the Court to resolve the question presented here.

1. The decision of the Iowa Supreme Court conflicts with the decisions of other state supreme courts which try to apply or adapt the "primary purpose" test articulated in *Davis*.

A major dividing point for lower courts is whether and how to apply the "primary purpose" test articulated in *Davis*. The *Davis* Court eschewed producing an "exhaustive classification of all conceivable statements" as either testimonial or nontestimonial, but instead held that the following dichotomy sufficed to settle the precise scenarios before the Court. Statements were "nontestimonial" when made during a police interrogation under circumstances objectively showing that the interrogation's "primary purpose" was to enable police to meet an ongoing emergency. By contrast, statements were "testimonial" when there was no ongoing emergency and the "primary purpose" of the interrogation was to prove

past events potentially relevant to a later prosecution. *Davis v. Washington*, 547 U.S. ___, 126 S. Ct. at 2273-2274.

Inevitably, the "primary purpose" component of *Davis* has found its way into the testimonial analysis concerning statements made by child victims. Some lower courts have viewed the "primary purpose" test as a flexible one and not limited to situations involving an emergency/non-emergency dichotomy. For example, in *State v. Krasky*, 736 N.W.2d at 643, the Minnesota Supreme Court declined to "read the *Davis* opinion to hold that only those statements made in response to an immediate danger are nontestimonial." The *Krasky* Court reasoned:

> The facts of *Davis* required the court "to determine more precisely which police interrogations produce testimony" and the precise question was whether emergency calls to police are treated differently than statements made in the regular course of a police investigation. *Id.* at 2273-74. The court specifically noted that its holding was limited to its facts. *Id.* at 2278 n. 5. . . . We conclude that the *Davis* decision leaves undisturbed our conclusions in *Bobadilla* and *Scacchetti* that statements elicited by a medical professional for the primary purpose of protecting a child sexual assault victim's health and welfare are nontestimonial.

State v. Krasky, 736 N.W.2d at 643.

Several intermediate state appellate courts examining children's reports of abuse likewise have determined that "the absence of an emergency does not, alone, make the statements testimonial." *Lollis v. State,* 232 S.W.3d 803, 807 (Tex. Ct. App. – Texarkana 2007) (applying "various factors" in determining "whether primary purpose of a statement was to get or give testimony or to accomplish some other purpose"); *see also Commonwealth v. Allshouse*, 924 A.2d 1215, 1223 (Pa. Super. 2007) ("we do not view the Supreme Court's primary purpose test as being reliant solely on the temporal relationship between the statement and the wrong the statement describes and, instead, view the test as encompassing the broader range of factors applied in *Davis*.").

Further examples of the flexible application of the primary purpose test are lower court decisions which have concluded that children's complaints addressed to health care providers were nontestimonial because they are made for the purpose of medical diagnosis or treatment, even though they are a report of past events. *See, e.g., United States v. Peneaux*, 432 F.3d 882, 896 (8th Cir. 2005) ("statements made to physician seeking to give medical aid . . . are presumptively nontestimonial"); *Foley v. State*, 914 So.2d 677, 685 (Miss. 2005) (child's statements were part of "neutral medical evaluation"); *State v. Vaught*, 682 N.W.2d 284, 291-92 (Neb. 2004) (victim taken by family to hospital to be examined).

The Iowa Supreme Court's analysis in *Bentley* conflicts with the above decisions which exported the

"primary purpose" test to a child assessment and treatment context. The Iowa court recognized that "one of the significant purposes of the interrogation was surely to protect and advance the treatment of J.G." but nevertheless the court ignored the framework of *Davis* by failing to undertake a "primary purpose" analysis. Appendix pages 14-15. The Iowa court does not explain why the circumstances which objectively show the purpose of the hospital interview was to promote the child's health and welfare could not create a situation where her statements were nontestimonial akin to the emergency purpose of Michelle McCottry's 911 call in *Davis*. Just as Ms. McCottry's 911 call was not testimony but "plainly a call for help," (*Davis*, 126 S. Ct. at 2276), J.G.'s self-assessment that she was acting out because she had been molested was the child declarant's cry for protection and treatment, not prosecution. Just as "no 'witness' goes into court to proclaim an emergency and seek help," (*Davis*, 126 S. Ct. at 2276), no "witness" goes into court to seek a remedy for her mental disorders.

Other lower courts have followed the *Davis* framework, but have confined its "primary purpose" test to the emergency/non-emergency duality. State courts of last resort from Kansas, Missouri and North Dakota have emphasized the timing of the children's statements in determining they were testimonial. *See State v. Henderson*, 160 P.3d 776, 790 (Kan. 2007) ("There was no emergency; F.J.I. was speaking of past events and Henderson was not in her home; her

demeanor was calm."); *State v. Justus*, 205 S.W.3d 872, 880 (Mo. 2006) ("S.J.'s statements were not produced in the midst of an 'ongoing emergency.' Rather, the evidence shows that S.J. was not in any immediate danger. S.J. was speaking about past events, about what Justus *had* done."); *State v. Blue*, 717 N.W.2d 558, 565 (N.D. 2006) ("Because there was no 'ongoing emergency' and the primary purpose of the videotaped interview in this case was 'to establish or prove past events potentially relevant to a later criminal prosecution,' we hold the videotape recording constituted a testimonial statement."); *see also Hernandez v. State*, 946 So.2d 1270, 1282 (Fla. App. 2 Dist. 2007) (questioning did not enable police to meet ongoing emergency when sex abuse occurred a week earlier); *State v. Buda*, 912 A.2d 735, 745 (N.J. Super. A.D. 2006) (statement was taken "when N.M. was no longer in danger and there was no 'ongoing emergency'"); *Rangel v. State*, 199 S.W.3d 523, 534 (Tex. App. – Fort Worth 2006) (child "was not facing ongoing emergency").

It is understandable that lower courts, in the absence of an overarching test for determining which statements are testimonial, would try to shoehorn child abuse scenarios into the emergency language from *Davis*. Nevertheless, it is evident that *Davis* did not intend for its holding to be a one-size-fits-all solution to the problem of deciding which out-of-court statements are the equivalent of in-court testimony. Lower courts and practitioners who serve abused children require a better tailored legal test.

2. The decision of the Iowa Supreme Court conflicts with the decisions of other state supreme courts which take into account the reasonable expectations of the child declarant.

Many lower courts read *Crawford v. Washington*, 541 U.S. at 51-52, as creating an "objective witness" test when it set forth three formulations of the "core" class of testimonial statements, two of which mentioned the thought process of the declarant, *i.e.* pretrial statements the witness would reasonably expect to be used prosecutorially and those statements made under circumstances which would lead an objective witness to believe would be available for use at a later trial. *See, e.g., United States v. Saget*, 377 F.3d 223, 228 (2nd Cir. 2004) (noting that "*Crawford* at least suggests that the determinative factor in determining whether a declarant bears testimony is the declarant's awareness or expectation that his or her statements may later be used at trial"); *United States v. Hendricks*, 395 F.3d 173, 181 (3rd Cir. 2005) (determining that intercepted statements between defendants and other third parties were not testimonial as the declarants did not make the statements in the belief that they might be used at a later trial); *United States v. Cromer*, 389 F.3d 662, 675 (6th Cir. 2004) ("The proper inquiry . . . is whether the declarant intends to bear testimony against the accused."); *United States v. Summers*, 414 F.3d 1287, 1302 (10th Cir. 2005) ("We conclude that the 'common nucleus' present in the formulations which the

Court considered centers on the reasonable expectations of the declarant"); *People v. Vigil*, 127 P.3d 916, 925 (Colo. 2006) ("we believe an objective test focusing on the reasonable expectations of a person in the declarant's position under the circumstances of the case most adequately safeguards the accused's Confrontation Clause right and most closely reflects the concerns underpinning the Sixth Amendment.").

The "objective witness" test has drawn skepticism after *Davis*. Some lower courts believe this Court switched from gauging the reasonable expectations of the declarant in *Crawford* to assessing only the intent of the questioner in *Davis*. *See State v. Siler*, 876 N.E.2d 534, 541 (Ohio 2007) ("The court's analysis in *Davis* does not focus on the expectations of the declarant . . . the test set forth in *Davis* centers on the statements and the objective circumstances indicating the primary purpose of the interrogation"); *State v. Mason*, 162 P.3d 396, 401 (Wash. 2007) ("the objective test seemed to shift from the declarant in *Crawford* to the interrogator in *Davis*"); *see also State v. Alvarez*, 143 P.3d 668, 672 (Ariz. App. 2006) ("Although not entirely clear, the Court in *Davis* apparently shifted the focus from the motivations or reasonable expectations of the declarant to the primary purpose of the interrogation."); *State v. Hooper*, ___ P.3d ___, 2006 WL 2328233, *5 (Idaho Ct. App. 2006) (finding objective witness test "discredited by *Davis*, which focuses not at all on the expectations of the declarant but on the content of the statement, the

circumstances under which it was made, and the interrogator's purpose in asking the questions").

Other courts and commentators are not convinced that the Court abandoned all concern about the declarant's perspective when deciding if a statement is testimonial. *See, e.g., People v. Stechly*, 870 N.E.2d 333, 359 (Ill. 2007) (finding that "outside the context of statements produced in response to government interrogation, it is the declarant's perspective which is paramount in a testimonial analysis"); *State v. Jensen*, 727 N.W.2d 518, 525 (Wis. 2007) (viewing *Davis* as "slightly expand[ing]" previous discussion of what constitutes testimonial statements and looking to subjective purpose of declarant in making statement); Richard D. Friedman, *Crawford, Davis, and Way Beyond*, 15 J.L. & Policy 553, 560 (2007) (maintaining that the perspective of the witness "should be the crucial" consideration even after *Davis*). Professor Friedman highlighted the statement from *Davis*: "And of course even when interrogation exists . . . it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate." *Id.* (citing *Davis v. Washington*, 547 U.S. at ___ n.1, 126 S. Ct. at 2274 n.1).

It is evident from this debate that *Davis* raised more questions than it answered concerning how a declarant's intent factors into the analysis of what statements are testimonial. The Court must resolve this major doctrinal dilemma before the legal community can function properly within the new

confrontation framework. Resolution is especially critical for lower courts called upon to examine whether and how an objective witness standard should be applied to a child declarant. *See State v. Henderson*, 160 P.3d 776, 784 (Kan. 2007) ("*Davis* did not address, however, what part, if any, the mindset of the declarant still plays in the testimonial calculus, much less the mindset of a child declarant as in the instant case.").

The age and developmental level of child witnesses have received uneven treatment among lower courts called to determine the admissibility of their statements. It is possible to discern four distinct approaches adopted by jurisdictions which have tackled this aspect of the Confrontation Clause question since *Crawford*.

One approach has been to consider an objectively reasonable person *in the child's position* when determining the statements were nontestimonial. For instance, a Texas appellate court began its Confrontation Clause analysis by considering "the age and sophistication of D.M.," who was four years old at the time she told a police officer that "a bad man had killed her [mommy] and took her away." The appellate court decided "that D.M.'s age and her emotional state are factors strongly suggesting that her statements to Officer Sullivan were non-testimonial." *Lagunas v. State*, 187 S.W.3d 503, 519 (Tex. App. – Austin 2005). Other jurisdictions have given primary consideration to the declarant's age when determining whether statements were testimonial. *See United*

States v. Coulter, 62 M.J. 520, 528 (N.M. Ct. Crim. App. 2005) ("Two-year-old KL could no more appreciate the possible future uses of her statements than she could understand the significance of what she was communicating."); *State v. Bobadilla*, 709 N.W.2d 243, 255 (Minn. 2006) ("given T.B.'s very young age, it is doubtful that he was even capable of understanding that his statements would be used at a trial"); *see also State v. Brigman*, 615 S.E.2d 21, 25 (N.C. App. 2005) ("J.B.'s age raises the question as to whether he was even capable of reasonably believing that these statements would be used at trial."); *In re D.L.*, 2005 WL 1119809 (Ohio App. 2005) (three-year-old victim's statements to a nurse practitioner were nontestimonial, in part because, "a reasonable child of her age" would not have believed her statements were for anything other than medical treatment); *State v. Dezee*, 125 Wash. App. 1009, 2005 WL 246190 (Wash. Ct. App. 2005) (the reasonable belief of the nine-year-old declarant would be relevant to determine if her statements were testimonial).

A second approach has been to factor in the child declarant's age as part of an objective witness test only if the statements are not the product of police interrogation. For example, the Colorado Supreme Court reasoned:

> [A]n assessment of whether or not a reasonable person in the position of the declarant would believe a statement would be available for use at a later trial involves an analysis of the expectations of a reasonable

> person in the position of the declarant. Expectations derive from circumstances, and, among other circumstances, a person's age is a pertinent characteristic for analysis.

People v. Vigil, 127 P.3d 916, 925 (Colo. 2006). The *Vigil* court cautioned, however, "if a child makes a statement to a government agent as part of a police interrogation, his statement is testimonial irrespective of the child's expectations regarding whether the statement will be available for use at a later trial." *Id.* at 926 n.8; *see also People v. Stechly,* 870 N.E.2d 333 (Illinois 2007); *State v. Siler*, 876 N.E.2d 534 (Ohio 2007); *State v. Mack*, 101 P.3d 349 (Or. 2004).

A third approach has been to view the tender age of the declarant as one concern among the totality of circumstances leading to the testimonial determination. Decisions from Kansas and Missouri consider "a young victim's awareness, or lack thereof, that her statement would be used to prosecute" not as dispositive of whether her statement is testimonial, but as one factor to consider in light of *Davis*. *See State v. Henderson*, 160 P.3d at 784-85; *State v. Justus*, 205 S.W.3d at 879.

A fourth approach has been to give no sway to the young age of the declarant. The Iowa Supreme Court's decision in *Bentley* falls into this fourth category. The Iowa court declined to consider the child declarant's age and mental condition in determining the testimonial nature of her statements to a hospital counselor.

> The State asserts that J.G.'s statements are nontestimonial because a reasonable child of J.G.'s chronological age (10) and functional age (7) would not have understood her statements would be used to prosecute the defendant. We conclude, however, an analysis of the purpose of the statements from the declarant's perspective is unnecessary under the circumstances presented here.

Appendix page 10.

The Iowa court's resistance to viewing the purpose of the statements from the child's perspective is in line with decisions of the Maryland Supreme Court and several intermediate state appellate courts. *See State v. Snowden*, 867 A.2d 314, 329 (Md. 2005) (finding "concern for the testimonial capacity of young children overlooks the fundamental principles underlying the Confrontation Clause"); *see also People v. Sisavath*, 13 Cal. Rptr. 3d 753, 758 n.3 (Cal. App. 5 Dist. 2004) ("Conceivably, the Supreme Court's reference to an 'objective witness' should be taken to mean an objective witness in the same category of persons as the actual witness – here, an objective four year old. But we do not think so."); *State v. Hooper*, ___ P.3d ___, 2006 WL 2328233, *5 (Idaho Ct. App. 2006) (holding that *Davis* foreclosed State's argument that six-year-old declarant would not have understood her statements would be subject to use later at trial).

The disarray among lower courts on whether to consider the child declarant's perspective calls for

resolution. The doctrinal divide among the lower courts has created intolerable uncertainty concerning the admissibility of children's reports of abuse. If lower courts are mistaken in deeming statements testimonial even when child declarants are oblivious to their future use, then too many child abuse prosecutions are endangered. On the other hand, if lower courts are mistaken in finding statements are nontestimonial unless the child is able to comprehend that they may be used to prosecute the perpetrator, then too many defendants are having their confrontation clause rights violated. This Court should resolve the post-*Davis* debate about the relevance of a child declarant's intent.

Furthermore, state court decisions like *Bentley* which refuse to consider a child's inability to anticipate the prosecutorial use of his or her statements must be reconciled with indications in *Crawford* and *Davis* that a co-defendant's statements made "unwittingly" to an FBI informant in *Bourjaily v. United States,* 483 U.S. 171 (1987), would be considered nontestimonial. *See Davis,* 126 S. Ct. at 2275; *Crawford,* 541 U.S. at 58. Although law enforcement was extensively involved in obtaining Bourjaily's statements, the statements are not considered the equivalent of in-court testimony because the declarant was not aware of their planned use. The Court should clarify why child witnesses who cannot comprehend the prosecutorial purpose of their statements should be subject to a different analysis than adult co-conspirators.

C. This case poses a question of fundamental importance to a nationwide system of Children's Advocacy Centers.

The proliferation of Children's Advocacy Centers has been heralded as one of the most important innovations of this decade in providing services to child abuse victims. Nancy Chandler, *Children's Advocacy Centers: Making a Difference One Child at a Time*, 28 Hamline Journal of Public Law and Policy 315, 324 (Fall 2006). The first such center opened in 1985 and by 2006 the National Children's Alliance had accredited centers in all 50 states. *Id.* These centers use a multi-disciplinary team approach to reduce the number of interviews abused children must endure and to deliver coordinated intervention services. *Id.* The National Children's Alliance estimated that its more than 600 member centers served 160,000 children in 2005. National Children's Alliance Annual Report p. 2, available at *www.nca-online.org* (last visited 12/2/07). Three-quarters of the children receiving services were under 12 years old. *Id.*

The United States Department of Justice has encouraged this multi-disciplinary approach for the last ten years as a way to encourage appropriate questioning of children. *See* U.S. DOJ, Law Enforcement Response to Child Abuse, http://www.ncjrs.gov/pdffiles/162425.pdf. More than forty states have legislation authorizing multi-disciplinary teams. *See* Myrna Raeder, *Comments on Child Abuse Litigation in a "Testimonial" World: The Intersection of Competency,*

Hearsay, and Confrontation, 82 Ind. L. J. 1009, 1023 (2007). Iowa law authorized the creation of child protection assistance teams like that operating from St. Luke's Hospital. *See* Iowa Code § 915.35.

The Iowa Supreme Court's assurance that it was not impugning the work of the St. Luke's program in finding the victim's statements to be "testimonial" does not allay the uncertainty faced by these centers in the wake of *Crawford* and *Davis*. These centers – by design – fulfill both therapeutic and investigative purposes. Lower court decisions which find children's statements to private interviewers to be testimonial overlook the independence of the non-law enforcement members of the team and undermine the effectiveness of the coordinated response to child abuse championed by these centers. The involvement of law enforcement on the child protection team which saves children the trauma of repeated stationhouse interviews is also the factor that some courts point to as rendering the children's statements testimonial. *See, e.g., State v. Snowden*, 867 A.2d 314, 327 (Md. 2005) (finding detective's presence during interview "overwhelms any argument that the statements were not testimonial because they were not in response to *police* questioning"); *In re S.R.*, 920 A.2d 1262, 1267 (Pa. Super. 2007) (finding it significant that police viewed proceeding through one-way glass and conferred with examiner).

The Iowa Supreme Court "leaves for another day the decision whether statements made by children

during interrogations conducted by forensic interviewers without police participation are testimonial." Appendix page 11. Other courts likewise have been reluctant to decide that all child statements made in such a multi-disciplinary setting are testimonial. *See People v. Sisavath*, 13 Cal. Rptr. 3d at 758 ("We have no occasion here to hold, and do not hold, that statements made in every MDIC interview are testimonial under *Crawford*.").

In light of such state court holdings, child advocacy centers face the dilemma of whether and how to adapt their protocols to minimize or eliminate law enforcement involvement to preserve the possibility that children's statements to interviewers would be considered "nontestimonial" and therefore admissible at trial if the child is eventually unavailable to testify. This problem is immediate and concrete because abused children commonly are found incompetent or emotionally unavailable to testify. Experts recognize that a child may not be available to testify "due to emotional or mental health reasons, pressures from family members to recant his allegations, or fear of facing the defendant." Amy Russell, *Best Practices in Child Forensic Interviews: Interview Instructions and Truth-Lie Discussions*, 28 Hamline Journal of Public Law and Policy 99, 130 n.160 (2006). If the law were more clear on what factors render a child's statements to be "testimonial," the counselors may be able to take statements about the abuse without setting up a Confrontation Clause challenge. The national importance of the child advocacy center movement

offers a compelling reason for the Court to grant certiorari in this case.

D. This case presents an excellent vehicle for clarifying the definition of "testimonial" as applied to child witnesses.

For several reasons, this case offers a prime opportunity for the Court to illuminate the meaning of "testimonial" as applied to child declarants, especially children reporting abuse to a private interviewer under circumstances which reveal both investigative and therapeutic purposes.

First, the case is not burdened by questions concerning the determination of unavailability. "Because the parties agree that J.G. is, tragically, 'unavailable,' and Bentley had no prior opportunity to cross-examine J.G., the admissibility of J.G.'s videotaped statements depends on whether they are 'testimonial' if offered against Bentley in this case." Appendix page 4.

Second, the record does not support a forfeiture argument. The respondent's brother, not the respondent, procured the victim's unavailability by killing her in advance of the sexual abuse trial. Accordingly, the Court faces the clean question of the testimonial nature of the child's statements.

Third, no procedural hurdles impede reaching the question presented. The respondent preserved the issue of his right to confront the deceased witness in

the trial court. The State properly challenged the trial court's exclusion of the evidence on discretionary review to the Iowa Supreme Court. The Iowa court's opinion stands solely on the federal Confrontation Clause; no adequate and independent state-law ground supports the decision. *See Michigan v. Long*, 463 U.S. 1032 (1983). The respondent's trial will not commence before this certiorari action is resolved because the prosecution stands or falls on the admissibility of J.G.'s statements. The State cannot avail itself of a harmless error argument.

Fourth, the realm of child assessment center interviews marks an ideal next step in the Court's jurisprudence defining "testimonial" statements. The work of these centers on behalf of abused children is progressive, widespread and important. Participants in the multi-disciplinary enterprise hunger for guidance on what factors may render a child's statements testimonial.

The hearing transcripts and exhibits in this case feature a detailed description of the origin, aims, protocol and actual operation of the St. Luke's Hospital Child Protection Center. Both the district court and the Iowa Supreme Court laud the work of the center and acknowledge the therapeutic purpose of the interview. These factual findings set in stark relief the legal questions whether a primary purpose test applies in this non-emergency context and whether the intent of the child declarant should be considered.

The certainty of the child's unavailability, the lack of a forfeiture issue and the strength of the record make the instant case a stronger prospect for review than the petition for certiorari in *Krasky v. Minnesota*, Sup. Ct. No. 07-7390, which presents a similar question and was pending before the Court at the time of this writing.

Finally, the facts of this case are typical. Law enforcement was involved with the child assessment interview to a greater extent than some cases and to a lesser extent than others. *Compare People v. Sisavath*, 13 Cal. Rptr. 3d 753 (Cal. App. 5 Dist. 2004) (statements found testimonial where district attorney and investigator attended interview at county facility) *with State v. Edinger*, 2006 WL 827412 (Ohio Ct. App. 2006) (statements found nontestimonial where police permitted to view child through closed circuit TV while she was making statement to social worker, but child was not made aware of police presence). J.G.'s chronological age of 10 and developmental age of seven or younger fall into the age groups most frequently served by child assessment centers. A decision addressing this common child abuse scenario would provide helpful precedent for the lower courts.

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CONCLUSION

For these reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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739 N.W.2d 296

Supreme Court of Iowa.
STATE of Iowa, Appellant,
v.
James Howard **BENTLEY**, Appellee.
No. 06-1000.

Sept. 28, 2007.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, David C. Thompson, Benton County Attorney, Harold Denton, Linn County Attorney, and Nicholas Maybanks, Assistant Linn County Attorney, for appellant.

Thomas J. O'Flaherty of O'Flaherty Law Firm, North Liberty, for appellee.

Alice A. Phillips of American Prosecutors Research Institute, Alexandria, Virginia, for amicus curiae.

HECHT, Justice.

The issue presented in this interlocutory appeal is whether the videotaped statements of J.G., a ten-year-old child, are admissible under the Confrontation Clause of the United States Constitution at James Bentley's trial on sexual abuse charges. Because we conclude J.G.'s statements are testimonial, J.G. is unavailable to testify at trial, and Bentley had no opportunity for cross-examination, we affirm the district court's ruling that the videotaped statements are inadmissible under the Confrontation Clause.

I. Factual Background.

On November 16, 2004, J.G. was interviewed by Roseanne Matuszek, a counselor at St. Luke's Child Protection Center (CPC).[1] The interview was arranged by Officer Ann Deutmeyer, an investigator employed by the Cedar Rapids Police Department, and Pam Holtz, a representative of the Iowa Department of Human Services (DHS). Officer Deutmeyer and Holtz watched and listened to the interview through an "observation window." During the videotaped interview, J.G. made numerous statements alleging James Bentley sexually abused her. Bentley's brother murdered J.G. on or around March 24, 2005. Other facts relevant to the disposition of this appeal will be presented below in our analysis of the legal issue presented.

II. Procedural Background.

Two days after J.G.'s interview at the CPC, the Linn County Attorney charged Bentley with the crime of sexual abuse in the second degree, in violation of Iowa Code sections 709.1 and 709.3 (2003). Soon afterward, the Benton County Attorney filed similar charges against Bentley.

Bentley filed in both cases a motion for a preliminary determination of the admissibility of J.G.'s

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[1] Matuszek holds a Master's Degree in counseling and has interviewed nearly 3,000 children during her fourteen years of service at the CPC.

videotaped interview under the Confrontation Clause of the United States Constitution. The district court ruled admission of the videotape would not violate the Confrontation Clause. After we denied Bentley's application for review of that ruling, he filed a motion in limine seeking to prevent the videotape's admission at trial.

After a hearing on the motion in limine, the district court held admission of the videotape would violate Bentley's constitutional right to confront a witness against him.[2] The State filed an application for discretionary review, which we granted. We stayed the district court proceedings pending resolution of this matter.

III. Standard of Review.

We review de novo claims involving the Confrontation Clause. *State v. Hallum,* 606 N.W.2d 351, 354 (Iowa 2000).

IV. Analysis.

The Confrontation Clause of the United States Constitution guarantees to Bentley the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. In *Crawford v. Washington,* 541

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[2] By agreement of the parties, the hearing and ruling on the motion in limine pertained to both the Linn and Benton County cases.

U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the United States Supreme Court held tape-recorded statements police officers elicited during a custodial interrogation of the defendant's wife were inadmissible at the defendant's trial because they were testimonial, the declarant was unavailable at trial, and the defendant had no prior opportunity for cross-examination. 541 U.S. at 38-40, 68-69, 124 S.Ct. at 1357, 1374, 158 L.Ed.2d at 184-85, 203. The Court reasoned that the text and history of the Sixth Amendment support two inferences: (1) "[T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused"; and (2) "[T]he Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Id.* at 50, 53-54, 124 S.Ct. at 1363, 1365, 158 L.Ed.2d at 192, 194. Because the parties agree that J.G. is, tragically, "unavailable," and Bentley had no prior opportunity to cross-examine J.G., the admissibility of J.G.'s videotaped statements depends on whether they are "testimonial" if offered against Bentley in this case. If the statements are testimonial, they are inadmissible against Bentley at trial; but if they are nontestimonial, the Confrontation Clause does not prevent their admission.

Prior to *Crawford,* the government bore the burden of proving constitutional admissibility in

response to a Confrontation Clause challenge. *United States v. Arnold,* 486 F.3d 177, 213 (6th Cir.2007) (Nelson Moore, J., dissenting) (citing *Idaho v. Wright,* 497 U.S. 805, 816, 110 S.Ct. 3139, 3147, 111 L.Ed.2d 638, 652 (1990); *Ohio v. Roberts,* 448 U.S. 56, 74-75, 100 S.Ct. 2531, 2543, 65 L.Ed.2d 597, 613 (1980)). It does not appear that *Crawford* altered this allocation of the burden of proof. *Id.* Accordingly, we conclude the government bears the burden of proving by a preponderance of the evidence that J.G.'s statements are nontestimonial.

The Court's view expressed in *Crawford* that the Framers intended the Confrontation Clause to preclude admission of "testimonial" statements made by unavailable witnesses who have not been subjected to cross-examination was based, in part, on the Confrontation Clause's express reference to "witnesses against the accused" – that is, to those who "bear testimony" against the accused, whether in court or out of court. *Crawford,* 541 U.S. at 51, 124 S.Ct. at 1364, 158 L.Ed.2d at 192 (internal quotation marks and citations omitted). One who "bears testimony" makes "[a] solemn declaration or affirmation . . . for the purpose of establishing or proving some fact." *Id.* (internal quotation marks and citations omitted).

The Court identified in *Crawford* "[v]arious formulations of th[e] core class of 'testimonial' statements" that the Confrontation Clause was intended to address: "*ex parte* in-court testimony or its functional equivalent," "extrajudicial statements . . . contained in formalized testimonial materials," and

"statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement[s] would be available for use at a later trial." *Id.* at 51-52, 124 S.Ct. at 1364, 158 L.Ed.2d at 193 (internal quotation marks and citations omitted). Although the Court did not offer a comprehensive definition of "testimonial statement," its opinion noted that even if a "narrow standard" is used to determine whether statements are testimonial, "[s]tatements taken by police officers in the course of interrogations," such as the declarant's statements in *Crawford,* are testimonial. *Id.* at 52, 124 S.Ct. at 1364, 158 L.Ed.2d at 193.

As the court noted in *Crawford,* "one can imagine various definitions of interrogation." 541 U.S. at 53 n. 4, 124 S.Ct. at 1365 n. 4, 158 L.Ed.2d at 194 n. 4. Using the term in its colloquial sense, as the court did in *Crawford, see id.,* we conclude the interview of J.G. was essentially a substitute for police interrogation at the station house. Representatives of the police department and DHS were present and participated in the interview. J.G. was informed at the outset of the conversation that a police officer was present and listening. The questions posed were calculated to elicit from J.G. factual details of the past criminal acts that Bentley had allegedly perpetrated against her. When the interview was concluded, the officer left the CPC with a videotaped copy of the interview which she considered evidence to be used against Bentley. The recorded interview conducted with the participation of a police officer is in our view a "modern practice[ ]

with closest kinship to the abuses at which the Confrontation Clause was directed." *Crawford,* 541 U.S. at 68, 124 S.Ct. at 1374, 158 L.Ed.2d at 203.

Upon our de novo review, we conclude the government has not met its burden of proving the recorded statements of J.G. identifying Bentley as her abuser and describing his acts of alleged sexual abuse are nontestimonial. The extensive involvement of a police officer in the interview leads us to conclude J.G.'s statements were in effect "taken by [a] police officer[ ] in the course of [an] interrogation[ ]." *Crawford,* 541 U.S. at 52, 124 S.Ct. at 1364, 158 L.Ed.2d at 193.

A "community task force steering committee," which included some law enforcement personnel, organized the CPC. The record discloses a close, ongoing relationship has persisted between the CPC and representatives of local law enforcement agencies. The CPC acknowledges that one of its objectives is to provide centralized access to services, including law enforcement services. The police department's standard operating procedure calls for the referral of child victims of sexual abuse to the CPC for "forensic interviews." Law enforcement officials make continuing education workshops available to CPC employees, and Matuszek has attended such seminars.

Holtz and Officer Deutmeyer arranged the appointment for J.G.'s interview at the CPC. Immediately before and after J.G.'s interview, a "multidisciplinary team," which included Officer Deutmeyer,

met to discuss the case. Such meetings of CPC team members routinely include discussions of whether crimes have been committed against the child-interviewee and the identities of the perpetrators of those crimes.

Officer Deutmeyer confirmed that CPC interviews with children generally focus "on the alleged crime." In fact, the interview of J.G. in this case illustrates the typical CPC interview protocol. Matuszek briefly engaged in casual "rapport building" as the interview began, but the subject of her questions and J.G.'s answers soon shifted and focused primarily on the specific acts of sexual abuse Bentley allegedly perpetrated against J.G.

The participants in the interview have acknowledged that the interview served an investigative function for the State. Matuszek's written "patient interview report" described the interview as an "evidentiary interview." Officer Deutmeyer accurately described Matuszek's conversation with J.G. as a "forensic interview" and an "investigative tool." J.G. was informed of the involvement of the police department on three separate occasions during the interview. Matuszek opened the interview by telling J.G. a police officer and a DHS representative were listening on the other side of the observation window. When J.G. subsequently indicated she wanted to discontinue the interview, Matuszek specifically implored J.G. to continue because "it's just really important the police know about everything that happened." At a later point in the interview,

Matuszek encouraged J.G. to provide additional details because the police were "probably going to want to know just a little bit more" about the arrangement of Bentley's apartment, where some of the alleged acts of sexual abuse occurred.

Officer Deutmeyer's involvement in the interview was not limited to mere observation. Toward the end of the interview, Matuszek told J.G. she was going next door to talk with the police officer and a representative of DHS about whether she "forgot to ask . . . some questions." When she returned to the interview room, Matuszek asked J.G. additional specific questions about Bentley's conduct. According to Officer Deutmeyer, questions posed to the interviewee after such mid-interview consultations between CPC staff and representatives of law enforcement are typically directed toward obtaining more "specific information because the child has given [the police] enough to believe that a crime has been committed," but the police need more evidence to substantiate the allegations and decide what course to pursue in future investigations. After J.G.'s interview, the CPC followed its protocol by giving a copy of the tape to Officer Deutmeyer. The tape of the interview was marked as "evidence" and placed in the police department's evidence storage room. These factual circumstances make it objectively apparent that "the purpose of the [recorded interview] was to nail down the truth about past criminal events." *Davis v. Washington,* 547 U.S. ___, ___, 126 S.Ct. 2266, 2278, 165 L.Ed.2d 224, 242 (2006).

Indicia of "formality" surrounding J.G.'s statements reinforce our determination that J.G.'s statements were the product of a police interrogation. J.G. spoke in a calm environment responding to a series of structured questions posed by Matuszek. The statements constituted a historical account of past events, deliberately provided in response to questioning regarding past events. The statements were made in an environment designed and equipped to facilitate forensic interviews calculated to collect evidence against those suspected of abusing children. As we have already noted, the interview room included an observation window that enabled police officers to watch and participate in the interview, and video equipment that was used to make a record of the interview for use by law enforcement officers.

The State asserts J.G.'s statements are nontestimonial because a reasonable child of J.G.'s chronological age (10) and functional age (7) would not have understood her statements would be used to prosecute the defendant. We conclude, however, an analysis of the purpose of the statements from the declarant's perspective is unnecessary under the circumstances presented here. J.G.'s testimonial statements lie at the very core of the definition of "testimonial," and fall within the category of *ex parte*

examinations against which the Confrontation Clause was directed.[3]

We also reject the State's assertion that Bentley's right to confrontation in this case should yield to the interests of J.G. and the State because the Confrontation Clause is not inflexibly applied. The United

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[3] We leave for another day the decision whether statements made by children during interrogations conducted by forensic interviewers without police participation are testimonial. As in *Crawford*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 and *Davis*, 547 U.S. ___, 126 S.Ct. 2266, 165 L.Ed.2d 224, our holding today makes it unnecessary to decide whether and when statements made to someone other than law enforcement personnel are "testimonial." Courts addressing this question have reached disparate conclusions. *Compare United States v. Bordeaux*, 400 F.3d 548, 556 (8th Cir.2005) (child sex abuse victim's videotaped statements made to a forensic interviewer were testimonial); *Rangel v. State*, 199 S.W.3d 523, 533-36 (Tex.App.2006) (child's statements made two months after alleged abuse to child protective services investigator were testimonial); *State v. Buda*, 389 N.J.Super. 241, 912 A.2d 735, 745-46 (2006) (child's statements to government-employed social worker were testimonial); *State v. Hopkins*, 137 Wash.App. 441, 154 P.3d 250, 257-58 (2007) (same), *with People v. Geno*, 261 Mich.App. 624, 683 N.W.2d 687, 692 (2004) (statement to director of children's assessment center was nontestimonial because the interrogator was not "a government employee"); *State v. Bobadilla*, 709 N.W.2d 243, 254-56 (Minn.2006) (child's statements to protective service worker during risk assessment interview were nontestimonial); *State v. Sheppard*, 164 Ohio App.3d 372, 842 N.E.2d 561, 566-67 (2005) (statement to private clinical counselor in mental health interview was nontestimonial); *Commonwealth v. Allshouse*, 924 A.2d 1215, 1222-24 (Pa.Super.Ct.2007) (child abuse victim's statements to county youth services caseworker at the child's home were nontestimonial).

States Supreme Court has concluded that "[a] State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court." *Maryland v. Craig*, 497 U.S. 836, 853, 110 S.Ct. 3157, 3167, 111 L.Ed.2d 666, 683 (1990). In *Craig*, the Court held the Confrontation Clause does not "categorically prohibit[]" testimony via closed circuit television by a child victim of sexual abuse if in-court testimony would be traumatic for the child. *Id.* at 840, 110 S.Ct. at 3160, 111 L.Ed.2d at 675. Although *Craig* does stand for the proposition that the circumstances of the confrontation may be modified to protect children, it does not support the State's assertion that the right of confrontation may be dispensed with altogether if the declarant is a child. In *Craig*, the child victim testified under oath during trial and was subjected to cross-examination through closed-circuit television. The circumstances in the case now before the court are quite different, as J.G. is deceased and therefore unavailable to testify against Bentley, who has no opportunity to subject J.G.'s recorded statements to cross-examination. Bentley's right to confront a witness against him need not yield to the State's interest under the circumstances of this case.

Our conclusion that J.G.'s statements are testimonial is consistent with the decisions of other courts. *L.J.K. v. Alabama*, 942 So.2d 854, 861 (Ala.2005) (statements of four-year-old and six-year-old children to a state-employed child abuse investigator were

testimonial); *T.P. v. State,* 911 So.2d 1117, 1123 (Ala.Crim.App.2004) (child's statements to a social worker in the presence of a police investigator were testimonial); *People v. Sisavath,* 118 Cal.App.4th 1396, 13 Cal.Rptr.3d 753, 757-58 (2004) (child's statement to interview specialist at a private victim assessment center, made in the presence of the prosecuting attorney and district attorney's investigator, was testimonial); *People v. Sharp,* 155 P.3d 577, 579-82 (Colo.Ct.App.2006) (five-year-old's videotaped interview with private forensic interviewer was testimonial where a police detective arranged the interview and interviewer asked questions requested by the detective); *In re Rolandis G.,* 352 Ill.App.3d 776, 288 Ill.Dec. 58, 817 N.E.2d 183, 188 (2004) (statements to private child abuse investigator while police officer watched through one-way glass were testimonial); *State v. Henderson,* 160 P.3d 776, 789-90 (Kan.2007) (statements made by child sexual abuse victim to social worker and police detective were testimonial); *State v. Snowden,* 385 Md. 64, 867 A.2d 314, 325 (2005) (child sex abuse victims' statements during interview with DHS sexual abuse investigator arranged by police detective were testimonial); *Flores v. State,* 121 Nev. 706, 120 P.3d 1170, 1178-79 (2005) (statements made by a child describing child abuse to police investigator and child protective services worker were testimonial); *State v. Blue,* 717 N.W.2d 558, 564 (N.D.2006) (statements to private forensic interviewer working "in concert with or as agent of" the police were testimonial); *State v. Mack,* 337 Or. 586, 101 P.3d 349, 352-53 (2004) (statements made by

three-year-old during interviews with DHS caseworker were testimonial, where police officers arranged the interviews as a substitute for police interrogation, were present during the interviews, and videotaped them); *State v. Pitt,* 209 Or.App. 270, 147 P.3d 940, 944-45 (2006) (statements made to private forensic child interviewer while police officer videotaped interview through one-way glass were testimonial), *opinion adhered to on reconsideration* at 212 Or.App. 523, 159 P.3d 329 (2007); *In re S.R.,* 920 A.2d 1262, 1264 (Pa.Super.Ct.2007) (child sex abuse victim's statements made to a forensic interview specialist while police officer watched through one-way glass were testimonial).

We credit the State's assertion that the CPC performs very important and laudable services in furtherance of the protection of children. The child-friendly CPC facility includes a waiting room and play area with toys, games, books, a fish aquarium, and a television. The interview room includes drawing supplies and is equipped to maximize children's comfort. It is beyond dispute that information gathered from J.G. in such a child-friendly, safe environment could have been very useful in the treatment of her well-documented psychological conditions. The work of the CPC and the team of professionals who took J.G.'s statement is not impugned by our characterization of J.G.'s statements as "testimonial." The actors were doing important work intended to investigate past alleged crimes and prevent future crimes. Although one of the significant purposes of the interrogation was

surely to protect and advance the treatment of J.G., as we have discussed above, the extensive involvement of the police in the interview rendered J.G.'s statements testimonial. Therefore, the district court correctly ruled the admission of the statements would violate Bentley's rights under the Confrontation Clause under the circumstances of this case.

V. Conclusion.

Bentley's right to confront witnesses against him is an essential constitutional right, and we must be vigilant in guarding against its erosion. On this point, we share the opinion of Chief Justice Marshall, who wrote:

> I know of no principle in the preservation of which all are more concerned. I know none, by undermining which, life, liberty and property, might be more endangered. It is therefore incumbent on courts to be watchful of every inroad on a principle so important.

See Crawford, 541 U.S. at 73, 124 S.Ct. at 1377, 158 L.Ed.2d at 206 (Rehnquist, J., concurring) (quoting *United States v. Burr,* 25 F.Cas. 187, 193 (C.C.Va.1807) (No. 14,694)). Under the circumstances of this case, the district court correctly concluded J.G. was a witness who bore testimony against Bentley in the recorded interview. Because Bentley has no opportunity to cross-examine J.G., the admission of her testimonial statements would violate Bentley's

right to confront witnesses against him. We therefore affirm the district court's ruling.

AFFIRMED.

IN THE IOWA DISTRICT COURT
IN AND FOR BENTON COUNTY

STATE OF IOWA, Plaintiff, vs. JAMES HOWARD BENTLEY, Defendant.	)	No. FECR009460

IN THE IOWA DISTRICT COURT
IN AND FOR LINN COUNTY

STATE OF IOWA, Plaintiff, vs. JAMES HOWARD BENTLEY, Defendant.	)	No. FECR058905

RULING ON EVIDENTIARY MOTIONS

(Filed Jun. 12, 2006)

Hearing was held at the Linn County Courthouse on the combined Motions in the above-entitled cases. The State was represented in the Benton County matter by County Attorney David Thompson, and in the Linn County matter by County Attorney Harold Denton and Assistant County Attorney Nicholas Maybanks. The Defendant was personally present with his Attorney, Mark Brown. Evidence was presented

concerning the Defendant's Motion in Limine (Child Protection Center videotape) and the State's Motion for Preliminary Determination (Testimony of Laura Sundell). Witnesses who testified at the hearing were Cedar Rapids police investigator Ann Deutmeyer, St. Luke's Hospital Child Protection Center Executive Director Susan Tesdahl, Child Protection Center Interviewer Rosanne Matuszek, and Licensed Social Worker and Play Therapist Laura Sundell. The parties also offered and the court received the videotape of the Child Protection Center interview of Jetseta Gage and the report of Investigator Matuszek. The Benton County Attorney advised that he would prepare and file a Minute of Testimony for Laura Sundell including and incorporating her discovery deposition. The Defendant is scheduled to be tried to a jury in Clarke County, Iowa, commencing on July 10, 2006, in the Benton County matter and commencing on August 14, 2006, in the Linn County matter.

This hearing had a two-fold purpose. First, more than thirteen months had passed since the admissibility of the Child Protection Center videotaped interview of Jetseta Gage was considered by Judge Koehler. During the intervening period, several cases from various jurisdictions have issued interpreting the United States Supreme Court ruling in *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed. 2d 177 (2004). In addition, new counsel has been appointed to represent the Defendant and additional information and evidence has been identified which was not presented during the prior hearing. Second,

the State has identified newly discovered evidence in the form of the testimony of Laura Sundell which it wishes to offer in each prosecution. Because of the similarity in legal issues between the Child Protection Center videotape and the interviews by Laura. Sundell, all of the evidence was presented for review by the court.

Findings of Fact

Jetseta Gage was born on August 25, 1994, and was murdered by the Defendant's brother, Roger Bentley, on or about March 24, 2005. Based upon reports made by the child to friends, family and authorities, the Defendant was charged with Sexual Abuse in the Second Degree in each of the respective counties. The Trial Information was filed in Linn County On December 6, 2004, and in Benton County on February 24, 2005. The Linn County file reflects that the Defendant obtained a continuance of trial pursuant to his motion and an order by the Honorable Larry Conmey on March 10, 2005. The court file also reflects that Jetseta Gage was served with a subpoena on March 4, 2005, for her examination by the Defendant's attorney in a discovery deposition scheduled for March 14, 2005. No evidence was presented on this subject, but the court infers from the circumstances that the discovery deposition was not held as scheduled because of the trial continuance order. Based upon all of the circumstances described herein, the court concludes that Jetseta Gage is an unavailable witness and, as will be discussed later in

this ruling, the court cannot conclude whether the Defendant had an opportunity to confront Jetseta Gage as a witness against him.

On November 16, 2004, Jetseta Gage was interviewed at the St. Luke's Hospital Child Protection Center (CPC) by interviewer Rosanne Matuszek. Also present and observing the interview from the observation room adjacent to the interview room were Cedar Rapids Police Investigator Ann Deutmeyer, and Department of Human Services assessor Pam Holtz. Jetseta was brought to the CPC by a family member. The initial referral to the CPC for the interview was by DHS Assessor Pam Holtz. The entire interview was videotaped in conformity with the protocol of the CPC. During the interview, Jetseta was questioned about her understanding of the concept of truthfulness and her understanding of basic anatomy. The interview included a standard phase of establishing the child's concept of the CPC and her safety in that setting. The videotape of the interview demonstrates the nature of the questions asked by Investigator Matuszek and the answers given by Jetseta. Prior to the completion of the interview, Matuszek, Deutmeyer and Holtz met to identify additional questions which Deutmeyer and/or Holtz requested in addition to the interview which had already been conducted. Additional questions were asked and the interview was completed. A copy of the videotape was kept at the CPC and the second copy was taken by Investigator Deutmeyer and kept at the Cedar Rapids Police Department. Dr. Kathleen

Opdebeeck performed a physical examination of the child for purposes of medical diagnosis, treatment and/or referral before she left the CPC. Following the interview and medical examination, the multi-disciplinary team, including the investigator, assessor and interviewer, met to review the results of the interview and examination and to make determinations concerning further action. As a result, a criminal complaint was filed in Linn County on November 18, 2004, Department of Human Services child protection actions were initiated and Jetseta was referred for mental health treatment and therapy. Interviewer Matuszek subsequently prepared a report of her interview and referred to the CPC activity as an "evidentiary interview and medical exam." All of the witnesses agreed that the CPC interview is a substitute for a law enforcement interview for various excellent reasons. Investigator Deutmeyer described the interview tape recording as an "investigative tool". At no time during the interview was the child advised of any possible or intended use of the video tape as a prosecution tool or as an exhibit in a criminal case. Finally, there was no discussion of Jetseta being a witness or being required to testify in any criminal proceeding.

The St. Luke's Hospital Child Protection Center has been in operation for nineteen years. During that time over 23,000 children have been interviewed at the CPC from a fifty-four county area in eastern Iowa. The majority of the children have been referred to the CPC from Linn County. Of the children interviewed,

80 percent were reviewed because of suspicions or reports of sexual abuse. Of the 23,000 referrals, 42 percent were "founded" in the sense used by the Department of Human Services. CPC Director Susan Tesdahl could not provide an accurate percentage or number of the referrals which resulted in criminal prosecutions. The mission as identified in the Mission Statement of the CPC is the safety and protection of children. The staff at the Center includes interviewers, the medical director and nursing staff in addition to the executive director. Referrals are typically received from the Department of Human Services, local law enforcement and area physicians. The forensic interview conducted at the Center is substituted for the law enforcement interview because of specialized training of the interviewer and to avoid repeated interviews which tend to re-victimize the minor children. The protocol of the CPC is a multidisciplinary approach to child welfare. It includes the three components of child protection, law enforcement and medical diagnosis and treatment. Funding for the CPC is underwritten by St. Luke's Hospital with funding provided by grants from the Iowa Department of Justice, the Iowa Department of Public Health and the National Children's Alliance. In addition, private contributions and donations as well as insurance coverage for individuals rounds out the funding for the Center's operations.

The CPC operates on a well-defined and strictly followed protocol for each "psychosocial assessment" or interview. An appointment is made on behalf on

the child pursuant to a formal referral from one of the sources described previously. The child is then registered as a patient. The interview may proceed or follow the medical examination, both of which are conducted at the CPC site. The interview is conducted by the trained CPC interviewer with the DHS assessor and the law enforcement officer observing from an observation room through a one-way glass or mirror. The entire interview is videotaped and preserved with one copy remaining at the CPC and the other copy being delivered to the law enforcement officer. Prior to the interview a team meeting is conducted among the interviewer, assessor and investigator. Following that pre-interview meeting, the team meets with any parent or guardian who accompanied the child to the Center. That person is not permitted to observe or participate in the interview, in any way. The medical director or her designee conducts a medical examination and interview either before or after the forensic interview. Following the interview, the multidisciplinary team meets once again to determine several questions. First, is the child safe? Second, was the child abused? Third, what should be done to protect the child and to deal with the abuse? The DHS assessor is a participant and focuses on the safety of the child and the law enforcement investigator focuses upon any follow-up criminal investigation. During the course of the interview, a set procedure is followed to assure reliability and accuracy. The child is engaged in a conversation to assess the child's, stage of development and understanding of terms. The child is assured of the safety of the place and

interview and reassured that they can tell what, if anything, has happened to them. The child is advised that the interview is videotaped and that there are other official persons observing the interview from behind the mirror. Prior to the completion of the interview, a conference is held among the interviewer, assessor and investigator to determine whether any further questions should be asked for the benefit of any one of them. Generally, any further child protection or criminal prosecution is handled by the respective participants or specialists to whom the child has been referred. It is common for the interviewer, assessor and investigator to be listed as potential witnesses in any criminal prosecution which may result.

Cedar Rapids Police Investigator Deutmeyer testified that she had been involved in similar investigations and interviews for the four years that she was the sex abuse investigator at the Cedar Rapids Police Department. She was involved in between 200 and 400 cases per year, many of which involved children and interviews at the CPC. She was familiar with and followed the CPC protocol for forensic interviews and considered gathering evidence for court as one of the objectives of the process. She characterized the interview videotape as an "investigative tool" and testified that it was used both by police officers and the county attorney. Finally, she testified that the interview by the CPC Interviewer was a substitute for the law enforcement interview.

Laura Sundell is a licensed social worker with a B.A. and M.S.W. from the University of Iowa. She has been a child play therapist for a number of years and has worked at the Cedar Centre and St. Luke's Family Counseling Center prior to her private practice. Ms. Sundell was providing therapy to Jetseta Gage as a result of a referral from psychiatrist, Dr. Castillo. Ms. Sundell was working with Jetseta because of many behavioral and developmental problems the child was exhibiting. The play therapy sessions lasted from 45 to 60 minutes per session on a virtually weekly basis. Other specialists were also helping the child with her developmental problems which were described at the hearing. Based upon her substantial education and experience, Ms. Sundell expressed the opinion that Jetseta was "several years younger" than her biological age and was a "seven year old" in development. She also described the child as impulsive with difficulty following directions. Ms. Sundell works with 20 to 30 children per week on a current basis and has had substantial experience over the years working with children in this setting. Ms. Sundell's work with Jetseta was entirely focused on behavior and medical issues. There had been no contact or communication between Ms. Sundell and law enforcement until February, 2006, when Benton County Attorney Thompson contacted her about any possible information she might have.

Ms. Sundell testified that Jetseta did not initially reveal that she was the victim of sexual abuse but did ultimately reveal that she had been victimized and

that she had been afraid to reveal that information earlier. Ms. Sundell compared those revelations with the four to five children per week with whom she works who are sex abuse victims. She testified that it is common for child sex abuse victims to initially fail to disclose the abuse and that there are various reasons for the initial withholding of that information. Finally, Ms. Sundell expressed the opinion that Jetseta's statements to her about sex abuse were truthful and consistent with her prior statements. In addition, her initial failure to disclose the abuse was consistent with behavior by children who have been sexually abused. There was no evidence to support any conclusion that statements by Jetseta to Ms. Sundell were intended for prosecution or court use, either by Ms. Sundell or Jetseta. In addition, no law enforcement agency or any other agency had made any attempt to use the play therapy information for court purposes prior to February, 2006. The sole purpose of the interviews and statements made were for therapy and treatment.

Conclusions of Law

The United States Supreme Court turned the analysis of hearsay admissibility in criminal cases on its head with its opinion in *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed. 2d 177 (2004). The admissibility of hearsay statements in criminal cases had been a familiar and comfortable exercise based upon the Supreme Court holding in *Ohio v. Roberts,* 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed. 2d 597

(1980). By abrogating the decision in *Ohio v. Roberts,* the *Crawford* Court switched the focus from hearsay rule analysis and reliability in all cases to a two-tiered process of Sixth Amendment Confrontation Clause analysis. The remaining discussion in these conclusions of law will deal with the holding in *Crawford,* id., and the eases or rules representing the analysis required by *Crawford.,* id.

Ohio v. Roberts and the Iowa Rules of Evidence, Iowa Court Rules 5.801, et seq., follow a traditional analysis of reliability and almost universally accepted exceptions to the hearsay role. *Crawford v. Washington,* eliminates *Roberts,* as authority except in the second stage of analysis.

Crawford v. Washington, resurrects the supremacy of the Sixth Amendment's Confrontation Clause over any hearsay statements by witnesses which were admissible under exceptions to the hearsay rule. *Crawford* does not preclude the admissibility of extra-judicial statements by witnesses testifying at trial. The premise upon which *Crawford* is based is found in the following quote from page 42: "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." This is otherwise known as the Sixth Amendment's Confrontation Clause and has been applied to State as well as Federal prosecutions. *Pointer v. Texas,* 380 U.S. 400, 406, 85 S.Ct. 1065, 13 L.Ed. 2d 923 (1965). The Supreme Court in *Crawford* summarized its position at page 50 as follows:

"First, the principle evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidenced against the accused. * * *

Accordingly, we once again reject the view that the Confrontation Clause applies of its own course only to in-court testimony, and that its application to out-of-court statements introduced at trial depends upon the 'law of Evidence for the time being. (citation omitted) Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices. Raleigh was, after all, perfectly free to confront those who read Cobham's confession in court. This focus also suggests that not all hearsay implicates the Sixth Amendment's core concerns. An offhand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted. On the other hand, ex parte examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them." * * *

"Testimony," in turn, is typically [a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." Ibid. An accuser who makes a formal statement to government officers bears testimony

> in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement."

The Supreme Court further explained its analysis as follows: "The historical record also supports a second proposition: That the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the Defendant had had a prior opportunity for cross-examination." The court then launched into a discussion of Confrontation Clause application to "testimonial" versus "non-testimonial" hearsay. What is unmistakably clear from *Crawford,* is that questioning of a witness by a police officer, magistrate or other law enforcement official is testimonial and is excluded by the Confrontation Clause if the witness was not available at trial and the Defendant had had no prior opportunity to cross-examine. Perhaps fearing unintended consequences, the Supreme Court specifically refused to define testimonial statements versus non-testimonial statements. Nor did the Supreme Court clarify exactly what was meant by the phrase "opportunity for cross-examination." Even though non-testimonial statements were not defined, the court made it clear that such non-testimonial statements could be admissible under a *Roberts,* analysis for reliability and hearsay exception application.

Two members of the court concurred in the judgment but dissented from the decision to overrule *Ohio v. Roberts,* id. To their challenge that the decision was not supported by reasoning or history, the majority in footnote 7 stated the following: "Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse – a fact borne out time and again throughout a history with which the Framers were keenly familiar. This consideration does not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances." At page 57, the court said. "we considered reliability factors beyond prior opportunity for cross-examination when the hearsay statement at issue was not testimonial." (citation omitted.) The court further explains at page 59 "our cases have thus remained faithful to the Framers' understanding: Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the Defendant has had a prior opportunity to cross-examine." To clarify, the court went on to state: "Finally, we reiterate that when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." In condemning the test under *Roberts v. Ohio,* the court stated at page 62: "The *Roberts* test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability". The Court characterizes reliability as "an

amorphous if not entirely subjective, concept." As a parting shot, the Supreme Court stated "we leave for another day any effort to spell out a comprehensive definition of 'testimonial.'" Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed."

Cases following *Crawford v. Washington,* id., in which various courts have attempted to apply the new standard, include: *United States v. Bordeaux,* 400 F. 3rd 548, (8th Cir. 2005); *U.S. v. Peneaux,* 432 F. 3rd 882 (8th Cir. 2005); *State v. Scacchetti,* 690 N.W.2d 393 (Minn. Ct. App. 2005); *People v. Sisavath,* 118 Cal. Rptr. 4th 1396 (Cal. Ct. App. 2004); *State v. Bobadilla,* 709 N.W.2d 243 (Minn. Ct. App. 2004); *State v. Newell* 710 N.W.2d 6 (Iowa 2006); *State v. Kalar,* No.5-220/05-0298 (Iowa Ct. App. 2006); and *State v. Williams,* 695 N.W.2d 23 (Iowa 2005). The common theme among all of these cases is the attempt by the respective courts to define, apply or interpret the concept of non-testimonial or testimonial statements. Some of the cases bear strong factual relationships to the instant case. The *Kalar* case fails to apply the testimonial statement test and moves directly to a second stage analysis of reliability upon an apparent assumption that the statement is non-testimonial. It is remarkable that the various courts apply a subjective analysis to the factual circumstances in determining

whether the statement was or was not testimonial. Because these various decisions apply a subjective test to the concept of testimonial statements, this court chooses to apply *Crawford v. Washington,* id., directly rather than attempt to apply potentially wrong conclusions reached by other courts.

State v. Rojas, 524 N.W.2d 659 (Iowa 1997), is a case in which the child witness testified at trial but recanted her original allegations of sexual abuse committed against her by that Defendant. The trial court admitted the pretrial videotaped interview of the child by a social worker pursuant to Rule of Evidence 803(24). The Supreme Court affirmed the conviction and trial court's ruling by applying the *Ohio v. Roberts* trustworthiness test and the residual exception to the hearsay rule. *Rojas* is not applicable to the confrontation clause analysis because the child testified at the trial. There is no finding that the child was unavailable and it was clear that she was available for cross-examination. *Rojas* is applicable to the evaluation of reliability in the event that the proffered statement is "non-testimonial."

State v. Tornquist, 600 N.W.2d 301 (Iowa 1999), is important in considering statements made to Laura Sundell. *Tornquist,* id., provides that extra-judicial statements to a licensed social worker could qualify as admissible under the medical diagnosis or treatment exception to the hearsay rule, 5.803(4). See also *State v. Hildreth,* 582 N.W.2d 167 (Iowa 1998) and *State v. Tracy,* 482 N.W.2d 675, 682 (Iowa 1992). The key factors in analyzing admissibility were the

experience of the licensed social worker and whether the information received by the social worker was "for purposes of diagnosis or treatment and that [the information] may assist in diagnosis or treatment of that disorder." *State v. Tonquist,* at 306.

Decision

Several issues demand close scrutiny in determining whether these extra judicial statements are admissible. First, it was suggested during the hearing that the video taped statement at the CPC should be admissible because the primary purpose or goal of the CPC mission is protection of the child. Thus, the question is whether the primary purpose is all important or whether secondary purposes can trigger exclusion under the Confrontation Clause. This court accepts as true and laudable Sue Tesdahl's testimony concerning the primary mission of the CPC. However, the facts clearly support the conclusion that at least three goals are included in the mission statement, one of those goals being criminal prosecution. It cannot be understated that all three of the goals of the mission statement are important. It is similarly clear that the law enforcement perspective includes all three goals but is focused upon potential criminal prosecution. Under the clearly defined protocol of the CPC in conjunction with the policies and procedure of the Cedar Rapids Police Department, it is clear that the CPC interviewer is a surrogate for the police investigator. Even though that relationship must render the statement in this case a testimonial

statement, the protocol and the policies and procedures should not change because of *Crawford v. Washington,* id. Of the cases which result in criminal prosecution, only a small percentage involve a witness unavailable at trial who had not been subject to the opportunity for cross-examination.

As long as the role of the interviewer as a surrogate law enforcement officer is significant, it is irrelevant whether the role is primary or secondary. This is true, in part, because to conclude otherwise invites pretextual determinations of primacy. The Supreme Court test makes the CPC interviewer a surrogate for law enforcement just as law enforcement was a surrogate for 18th Century magistrates.

Second, several state courts have applied a subjective test to the determination of testimonial versus non-testimonial statements. This begs the question whether the analysis should be subjective or objective. Those courts tend to focus on the perception of the child and whether the child is making statements with anticipation that the statements would be used in court. To use that focus is to create a child witness exception to the Confrontation Clause. That type of analysis really has nothing to do with the Confrontation Clause and everything to do with the reliability of the statement. It is a return to the subjective analysis of *Roberts v. Ohio*, id, abrogated by the Supreme Court. When the focus is placed upon perception of the witness or even intent of the interviewer, subjective fictions characterizing the interview result. The test cannot be whether the witness

understood the potential use of the interview. The logical extension of such a principle would be to conclude that the interview of a very young child by police officers with a specific purpose of criminal prosecution would be non-testimonial because the child would not have the sophistication to understand the process. Although less clear, it is also wrong to focus on the purpose or intent of the investigator. In this case, the interview followed a clearly defined and always followed protocol. Part of that protocol was the preservation of the interview on videotape and providing a copy to law enforcement. It cannot be argued that law enforcement would sometimes choose to use the videotape and sometimes not. To not use the videotape might suggest that the videotape contains exculpatory information beneficial to the Defendant. Consequently, the act of preserving the interview on videotape and the potential for its use by law enforcement or prosecution renders the videotape testimonial, No subjective or objective analysis can alter that obvious result. A more appropriate analysis is whether the information is known to and routinely made available to law enforcement than to try to discern intent or purpose from the preservation.

Focusing on the ability of the witness is also a red herring. To determine admissibility upon the level of sophistication or knowledge of the witness could lead to absurd results. It should be unnecessary to fully analyze this proposition in light of previous discussion.

Crawford v. Washington, id., has turned hearsay admissibility on its head in criminal cases. This is because statements which in absolute terms may be far more reliable will be inadmissible under the Confrontation Clause test. Conversely, statements which are far less reliable but which are non-testimonial may be admissible simply because they exceed a minimum threshold of reliability. For example, the videotaped and preserved interview at the CPC by a highly-trained and experienced interviewer whose primary interest is welfare or protection of the minor child is inadmissible while offhand remarks to a bystander under certain circumstances may be admissible because they are non-testimonial and minimally reliable.

Within the framework of case law in the state of Iowa, *Crawford v. Washington* id., creates little change in the admissibility of extra-judicial videotaped statements in child sexual abuse cases. A review of the cases applying Rule 5.801(d)(1) shows limited admissibility of such videotape evidence even when the witness testifies at trial. Of the Iowa Supreme Court decisions in which the question of Rule 5.803(24) was invoked, only a few opinions would have been different under *Crawford.*

In light of the explicit inclusion of police interviews within the definition of testimonial statement by the United States Supreme Court, it must be concluded that the tape recorded interview of Jetseta Gage is inadmissible.

What was not addressed in the evidence at the hearing nor was it defined by the United States Supreme Court was the issue of the unavailability of the witness and "the Defendant had had a prior opportunity for cross-examination." Does that phrase mean the statement is inadmissible even if the Defendant could have discovered the testimony of the witness and subjected her to cross-examination? If defense counsel had actually deposed Jetseta Gage on March 14, 2005, would that deposition have been the "prior opportunity for cross-examination"? Or, conversely, could the Defendant have specified that the deposition was strictly for discovery purposes and not available for any other purpose at the time of trial? Or, could the Defendant avoid admissibility by refusing to depose the victim? The factual record and cited authority are insufficient to answer these questions. In this case, there was no discovery deposition and no examination. In light of the lack of authority on this particular subject, the court merely raises these issues because the potential exists. Had the prosecution initiated a testimonial event which would have forced upon defense counsel the testimony of the witness and the opportunity for cross-examination, the answer might be different. The problem with such an aggressive prosecution tactic is that it tends to revictimize the child and destroys one of the protections of the CPC protocol.

Finally, there is the remaining admissibility issue of the statements to Laura Sundell. Laura Sundell had no relationship with law enforcement or

prosecution and had received no contact from anyone associated with either until February, 2006. All of the statements by Jetseta Gage to Laura Sundell were offered within the context of diagnosis, therapy and treatment. Finally, Ms. Sundell, using her substantial training and experience, concluded that the statements of Jetseta Gage were reliable. In addition, they were consistent with reports to other, e.g., the CPC interview. Under the analysis of *Crawford v. Washington.*, id., the statements are non-testimonial. Based upon those same factors, the statements to Laura Sundell are admissible under Iowa Court Rule 5.803(4) and 5.803(24) and *State v. Rojas,* 524 N.W.2d 659 (Iowa 1997).

For the reasons stated herein, the videotape of the interview at the St. Luke's Child Protection Center is inadmissible pursuant to the Confrontation Clause of the Sixth Amendment of the Constitution of the United States, and the statements to play therapist Laura Sundell are admissible unless excluded upon other grounds.

DATED: June 9, 2006. Clerk to notify.

/s/ Denver D. Dillard
DENVER D. DILLARD,
Judge of the Sixth Judicial District of Iowa

IN THE IOWA DISTRICT COURT IN AND FOR LINN COUNTY/BENTON COUNTY

THE STATE OF IOWA,	) Linn County
Plaintiff,	) No. FECR058905
	) Benton County
vs.	) No. FECR009460
JAMES HOWARD BENTLEY,	) RULING
Defendant.	) (Filed May 20, 2005)

The Motion for Preliminary Determination of Admissibility Pursuant to Iowa Rule of Evidence 5.104 filed by Defendant James Howard Bentley was heard, by the undersigned on May 11, 2005. Linn County Attorney Harold Denton, Assistant Linn County Attorney Nick Maybanks, and Benton County Attorney David Thompson appeared on behalf of the State of Iowa. Attorney David Fiester appeared on behalf of the Defendant James Howard Bentley. Defendant James Howard Bentley was present at the hearing. The Court received the testimony of witness Rosanne Matuszek and admitted into evidence State's Exhibits 1 and 2.

After considering the parties' arguments, written briefs, exhibits, the file and relevant law, the Court now enters the following ruling.

FINDINGS OF FACT

Defendant James Howard Bentley is charged with Second Degree Sexual Abuse in violation of Iowa Code §§ 709.1 and 709.3. He is accused of sexually abusing a ten-year-old female in Cedar Rapids, Iowa, between January 1, 2002 and November 17, 2004, and in Benton County, Iowa, between the months of October and November 2004.

On or about April 6, 2005, Defendant filed a Motion for Preliminary Determination of Admissibility Pursuant to Iowa Rule of Evidence 5.104. The Motion stems from the following facts: On November 16, 2004, the alleged victim, J.G., a minor child then ten years of age, was interviewed at St. Luke's Child Protection Center. The Center provides centralized services for children when there are allegations of abuse, thereby preventing a child from being reinterviewed more than one time by multiple agencies. The lead interviewer at the Center, Rosanne Matuszek, conducted the interview. Investigator Ann Deutmeyer of the Cedar Rapids Police Department and Pam Holtz of the Department of Human Services observed the interview. In the interview, J.G. reported the acts of sexual abuse Mr. Bentley allegedly committed against her. J.G. died in March 2005. The November 16, 2004 interview was videotaped, and the State intends to introduce the videotape at trial as part of its case-in-chief against Mr. Bentley. Mr. Bentley argues that allowing the videotape into evidence constitutes a violation of his Sixth Amendment right to confront his accuser under *Crawford v. Washington,* 541 U.S.

36 (2004) because J.G. is not available to testify at trial, and he did not have an opportunity to cross examine her. The State argues that the rule announced in *Crawford* does not apply to bar admission of the videotaped interview because J.G.'s statements during the interview were not testimonial.

CONCLUSIONS OF LAW

I. Confrontation Clause

The Sixth Amendment's Confrontation Clause assures: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The Sixth Amendment was incorporated and made applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Pointer v. Texas,* 380 U.S. 400, 406 (1965). The United States Supreme Court recently re-examined its Confrontation Clause jurisprudence in *Crawford* where it considered the reliability test of *Ohio v. Roberts,* 448 U.S. 56, 66 (1980): "an unavailable witness's out-of-court statement may be admitted so long as it has adequate indicia of reliability – i.e., falls within a 'firmly rooted hearsay exception' or bears 'particularized guarantees of trustworthiness.'" *Crawford,* 541 U.S. at 42 (quoting *Roberts,* 448 U.S. at 66).

In *Crawford,* the Court engaged in a historical analysis of the clause and concluded the history supports two inferences regarding the meaning of the Sixth Amendment: 1) "the principal evil at which the

Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused;" and 2) the "framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Id.* at 50-54. These two inferences led the Court to overrule the aforementioned *Roberts* test. *Id.* The new Confrontation Clause rule announced in *Crawford* states that testimonial statements of witnesses absent from trial are admissible "only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Id.* at 59. In this case, the deceased declarant, J.G., is unavailable for trial, and Mr. Bentley did not have an opportunity to cross-examine her. Therefore, the issue before the Court is whether J.G.'s statements in the November 16, 2004 videotaped interview were "testimonial."

A. Whether J.G.'s statements were "testimonial"?

The Court in *Crawford* declined to provide an exact definition of "testimonial," stating; "We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'" *Id.* at 68. The Court did impart the following guidance;

> Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former

> trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.

The Court also provided; "'Testimony' . . . is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" *Id.* at 51 (quoting, 1 N. Webster, An American Dictionary of the English Language (1828)). Pursuant to this definition, the Court explained that "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text . . . reflects an especially acute concern with a specific type of out-of-court statement." *Id.* Three formulations of "this core class of 'testimonial' statements" exist:

1) *ex parte* in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially;

2) extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; and

3) statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

Crawford, 541 U.S. at 51.

The State argues that the above examples of testimonial statements provided by *Crawford* do not include anything similar to the videotaped interview at issue in this matter. The State also argues that the third formulation of testimonial statements is salient and asserts that an interview of a young child cannot be deemed testimonial if the child cannot reasonably comprehend that the statements may be later used at trial. Mr. Bentley, on the other hand, argues that J.G.'s statements during the videotaped interview were testimonial because the interview was conducted in conjunction with law enforcement officials and the purpose of the interview was to gather information to use in the investigation and prosecution of the sexual abuse allegations against him. Mr. Bentley also argues that the statements were testimonial because J.G. knew that reporting a claim of sexual abuse would result in legal action.

The Iowa Supreme Court has not yet confronted the application of *Crawford* although such claims have been presented to it. In *State v. Williams,* 695 N.W.2d 23, 29 (Iowa 2005), the defendant argued his trial counsel was ineffective due to his failure to object to the alleged domestic abuse victim's hearsay statements on the grounds that said statements were

in violation of his Sixth Amendment Confrontation Clause rights pursuant to *Crawford.* The court declined to address the applicability of *Crawford* to the situation before it, finding that the decision cannot be applied retroactively to support a claim for ineffective assistance of counsel. *Id.* In so holding, the court recognized "the law to be an evolving process that often makes the resolution of legal questions a composite of several cases." *Id.* at 30. Therefore, this Court will attempt to "gain a . . . view of the puzzle before arranging the pieces" by reviewing other state and federal cases that have addressed the issue of whether a child's statements to an interviewer regarding child abuse allegations are testimonial under *Crawford. Id.*

1. Review of federal and state court cases

The courts that have found a minor child's statements during an interview regarding abuse allegations to be testimonial base their analysis on a combination of the following factors: 1) the formality of the questioning; 2) government involvement in the interview; and 3) the investigative or prosecutorial purpose of the interview. *See e.g., United States v. Bordeaux,* 400 F.3d 548, 556 (8th Cir. 2005) (videotaped interview of minor child at a child evaluation center was testimonial because, like police interrogations, the interview was formal, there was government involvement and the purpose of the interview was to collect information for law enforcement officials);

Snowden v. State, 846 A.2d 36, 47 (Md. Ct. App. 2004) (minor children's statements to a social worker were testimonial where the children were interviewed for the "expressed purpose of developing their testimony"); *State v. Bobadilla,* 690 N.W.2d 345, 349 (Minn. Ct. App. 2004) (statements made by a four-year-old during a videotaped interview conducted by a child protection worker and police officer were testimonial where the interviewer asked the child specific questions as to whether anyone had hurt him, who and how, which indicated the interview was conducted for the purpose of developing a case against the defendant); *In re T.T.,* 815 N.E.2d 789, 802 (Ill. Ct. App. 2004) (seven-year-old's statements to a social worker were testimonial where the social worker was working at the behest of and in tandem with the State's attorney with the intent and purpose of assisting in prosecutorial effort); *People v. Sisavath,* 118 Cal.Rptr.4th 1396, 1402 (Cal. Ct. App. 2004) (minor child's statements during videotaped interview at a facility designed for interviewing child suspected of being victims of child abuse were testimonial because by the time the interview took place, "the original complaint and information had been filed and a preliminary hearing had been held").

The courts that have found a minor child's statements during an interview regarding abuse allegations to not be testimonial emphasize: 1) the lack of government involvement; 2) questioning conducted by non-governmental employees; and 3) the purpose of questioning is for medical treatment or diagnosis. *See*

e.g., State v. Vaught, 682 N.W.2d 284, 291 (Neb. 2004) (four-year-old's statement to an emergency room doctor was not testimonial because the doctor questioned the child for the purpose of medical treatment and there was no indication of government involvement in the initiation of the exam or during the course thereof); *State v. Scacchetti,* 690 N.W.2d 393, 396 (Minn. Ct. App. 2005) (three-year-old's videotaped statements to a specialist from a child resource center were not testimonial because the interviewer's purpose was to provide medical diagnosis and the interviewer was not working on behalf of investigating police officers or other government officials); *State v. Fisher,* 108 P.3d 1262, 1269 (Wash. Ct. App. 2004) (two-year-old's statements to doctor while in hospital were not testimonial where the doctor questioned the victim as a part of the efforts to provide medical treatment and there was no indication of a purpose to prepare testimony for trial); *People v. Geno,* 683 N.W.2d 687, 692 (Mich. Ct. App. 2004) (holding in dicta that a two-year-old's statement to the executive director of a child assessment center during the course of the director's interview of the child was not testimonial because the interviewer was not a government employee).

The rationale of each of these courts and the importance assigned to the aforementioned factors varies considerably. Some base their reasoning solely upon the Court's identification of modem practices that are closely linked to the abuses at which the Confrontation Clause was directed, i.e. police interrogation, and

attempt to analogize the interview of the child to the defining characteristics of such practices. See *Bordeaux,* 400 F.3d at 556. *But see Evans v. Luebbers,* 371 F.3d 438 (8th Cir. 2004) (court found that statements a wife made before her death regarding her fear of her husband were not testimonial because these statements were not one of the express examples provided by *Crawford*).

Other courts concentrate on the three formulations of the core class of testimonial statements identified by *Crawford.* See *Scacchetti,* 690 N.W.2d at 396; *Sisavath,* 118 Cal.Rptr.4th at 1402, n.3; *People v. Vigil,* 104 P.3d 258, 262-263 (statements made by a seven-year-old child during a videotaped interview conducted by a police officer were testimonial). These courts' analyses most often focus on the third formulation; "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford,* 541 U.S. at 51. The courts have interpreted the reference to "objective witness" in two different ways: 1) objective witness refers to an objective witness in the same category of persons as the actual witness, *Scacchetti,* 690 N.W.2d at 396; and 2) objective witness refers to an objective observer. *Sisavath,* 118 Cal.Rptr.4th at 1402, n.3. In both *Scacchetti,* and *Sisavath,* the children were interviewed at specially designed facilities for interviewing and diagnosing children suspected of being victims of abuse by trained interviewers, and the interviews were videotaped. However, although

the children were questioned under very similar circumstances, the court in *Scacchetti* found the statements were not testimonial while the court in *Sisavath* found the statements were testimonial because of their different interpretations of "objective witness." *Scacchetti,* 690 N.W.2d at 396 (defendant failed to establish these circumstance would lead the "three-year-old to reasonably believe her disclosures would be available for use at a later trial, or that the circumstances would lead a reasonable child of her age to have that expectation"); *Sisavath,* 118 Cal.Rptr.4th at 1402, n.3 (child's statement was given under circumstances in which its use in a prosecution is reasonably foreseeable by an objective observer).

2. Application

This Court finds that J.G.'s statements to Ms. Matuszek during the videotaped interview at St. Luke's Child Protection Center were not testimonial. First, the statements do not fit within those examples that *Crawford* identifies as clearly testimonial, i.e., J.G.'s statements were not testimony at a preliminary hearing, before a grand jury, or at a former trial; or statements made during police interrogation. *Crawford,* 541 U.S. at 51. Unlike the court in *Bordeaux,* this Court finds that J.G.'s interview at the Child Protection Center was not similar to a police interrogation because the questioning in this case was not formal, there was minimal government involvement, and the purpose of the interview was not solely related to law enforcement. *Bordeaux,* 400 F.3d at

556. The Court will discuss its reasoning as to these factors in more detail below. Second, the statements do not fit within any of the three formulations of the core class of testimonial statements identified by *Crawford*. *Crawford,* 541 U.S. at 51. J.G.'s statements were not *ex parte* in-court testimony or its functional equivalent. *Id.* Nor were her utterances extrajudicial statements contained in formalized materials. *Id.* As to the third formulation, this Court adopts the "objective witness" interpretation utilized by the court in *Scacchetti*. *Scacchetti,* 690 N.W.2d at 396. Therefore, the question before the Court is whether the circumstances surrounding the contested statements led the ten-year-old to reasonably believe her disclosures would be available for use at a later trial, or that the circumstances would lead a reasonable child of her age to have that expectation. The Court's examination of the circumstances surrounding Ms. Matuszek's interview of J.G. will focus in particular on the following factors identified as important by other courts: 1) the formality of questioning; 2) the extent of government involvement; and 3) the purpose of the interview. *See e.g., Bordeaux,* 400 F.3d at 556; *In re T.T.,* 815 N.E.2d at 802; *Scacchetti,* 690 N.W.2d at 396.

Ms. Matuszek's questioning of J.G. was not formal. She asked J.G. open-ended, non-leading questions in a relaxed atmosphere in a room designed to be comfortable for children. The government's involvement in the interview was peripheral, unlike the government involvement in *Vigil* where a police officer conducted the questioning of the child abuse

victim. *Vigil,* 104 P.3d at 262. *See also Sisavath,* 118 Cal.Rptr.4th at 1402 (the prosecutor, as well as an investigator from the prosecutor's office, were present at the interview of the child). Ms. Matuszek conducted the interview of J.G. at the request of Pam Holtz of the Department of Human Services and Investigator Ann Deutmeyer of the Cedar Rapids Police Department. Ms. Matuszek's interview of J.G. took place in the Center's interview room with only J.G. and Ms. Matuszek present. Like the interview of the child in *Geno,* a non-government employee, Ms. Matuszek, exclusively conducted the questioning of J.G. during the interview. *Geno,* 683 N.W.2d at 692. However, she did leave the room once to confer with Ms. Holtz and Ms. Deutmeyer who were observing the interview behind an observation mirror. Ms. Matuszek informed J.G. that Ms. Holtz and Ms. Deutmeyer were observing the interview, but J.G. did not seem concerned with this and did not refer to or question their presence during the interview. Ms. Matuszek stated that she never talked with J.G. about the interview being used to for the basis of a prosecution against Mr. Bentley, nor did they discuss a court case of any type during the interview. Unlike the defendant in *Sisavath,* at the time of the interview herein, there were no charges against Mr. Bentley, nor had he been arrested or questioned by the police *Sisavath,* 118 Cal.Rptr.4th at 1402. Therefore, government involvement in J.G.'s interview was minimal.

The purpose of the interview is more difficult to ascertain. The evidence presented to the Court reveals that J.G. had a significant history of medical and behavioral problems. J.G. was an inpatient at St. Luke's Hospital several times in relation to her behavior problems, mood swings, and an attempt to strangle herself. She was hospitalized at St. Luke's on November 14, 2004, just two days before her interview with Ms. Matuszek at the St. Luke's Child Protection Center. J.G. volunteered to Ms. Matuszek why she was at the Center, which Ms. Matuszek testified was unusual because she normally has to ask the child why they are at the Center. However, in J.G.'s case, as Ms. Matuszek was beginning to explain the rules of the interview room, J.G. "reported that the reason she was acting this way (referring to having fits) was because she was molested." State's Exhibit 1. After the conclusion of J.G.'s interview, she underwent a medical exam by the Center's pediatrician. Unlike *Snowden,* where the express purpose of the interview was to develop the children's testimony for trial, Ms. Matuszek stated that her purpose in interviewing J.G. was merely to gather information. *Snowden,* 846 A.2d at 47. Therefore, the Court concludes this evidence establishes the overriding purpose of J.G.'s interview was for medical treatment, although a law enforcement purpose was also likely present.

The Court finds that these circumstances indicate that J.G. did not believe her disclosures would be available for use at a later trial. In fact, J.G.'s

statement to Ms. Matuszek as to the reason why she was at the Center indicates that J.G. believed her presence at the Center was related to her inpatient stays at St. Luke's Hospital for her behavior problems. Furthermore, J.G. seemed ambivalent to the observation of the interview by Ms. Deutmeyer and Ms. Holtz, not referring to them or questioning the reason for their presence at any time during the interview. The Court rejects Mr. Bentley's argument that J.G. knew that reporting a claim of sexual abuse would result in legal action against the accused. Mr. Bentley asserts that J.G. appeared to be of normal development, both physically and mentally, and as such, she was clearly capable of appreciating there are consequences for illegal behavior. While this may be true, academics have suggested that young children making a statement to authorities may not understand that sexual abuse is wrong or that a perpetrator is subject to punishment as a result. *Children as Victims and Witnessess in the Criminal Trial Process: The Conundrum of Children, Confrontation, and Hearsay,* Richard D. Friedman, 65 Law & Contemporary Problems 243, 250 (2002). Like the Court in *Scacchetti,* this Court also finds the circumstances surrounding the interview suggest that a child of J.G.'s age would not reasonably believe her disclosures to Ms. Matuszek would be available for use at a later trial. The questioning was informal, there was minimal government involvement, and there is no evidence indicating that the main or sole purpose of the interview was to develop a case against Mr. Bentley. Ms. Matuszek's interview of J.G.,

a ten-year-old alleged victim of sexual abuse, at St. Luke's Child Protection Center "bears little resemblance to the civil-law abuses the Confrontation Clause targeted." *Crawford,* 541 U.S. at 51. Therefore, the Court concludes that J.G.'s statements in the videotaped interview at St. Luke's Child Protection Center were not testimonial. Hence, Mr. Bentley's Sixth Amendment Confrontation Clause rights, as articulated by *Crawford,* will not be violated by the admission of the videotape of the interview at trial in this matter.

The Court's inquiry regarding the admissibility of the videotape does not end here. "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law – as does *Roberts,* and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." *Id.* at 68. This Court must therefore examine the admissibility of the videotape according to Iowa's evidentiary laws.

II. Hearsay Analysis

The State argues that J.G.'s out-of-court statements are admissible pursuant to two hearsay exceptions: 1) the residual hearsay exception under I.R.Evid. 5.803(24); and 2) the medical diagnosis or treatment hearsay exception under I.R.Evid. 5.803(4). Mr. Bentley argues that both these hearsay exceptions are inapplicable.

A. Whether J.G.'s statements are admissible under the residual exception to the hearsay rule, I.R.Evid. 5.803(24)?

In *State v. Rojas,* 524 N.W.2d 659 (Iowa 1994), the Iowa Supreme Court ruled that a social worker's interview of a ten-year-old minor child at St. Luke's Child Protection Center was properly admitted under the residual exception to the hearsay rule pursuant to I.R.Evid. 5.803(24). The court in *Rojas* noted that "the requirements for admissibility under the residual exception are five-fold: trustworthiness, materiality, necessity, service of the interest of justice, and notice." *Id.* at 662-62 (citing *State v. Brown,* 341 N.W.2d 14 (Iowa 1983)). The court also made note of the special provision contained in Iowa Code § 915.38(3), which provides:

> The court may upon motion of a party admit into evidence the recorded statements of a child, as defined in Section 702.5, describing sexual contact performed with or on the child, not otherwise admissible in evidence by statute or court rule if the court determines that the recorded statement substantially comport with the requirements for admission under Rule of Evidence 5.803(24) or 5.804(b)(5).

Iowa Code § 915.38(3). *Rojas* stated that § 915.38(3) makes it "clear that the residual exception to the hearsay rule may be used to admit statements made by the child sex abuse victim when the requirements of the exception are met." *Rojas,* 524 N.W.2d at 663.

In its analysis of the five factors utilized to determine the admissibility of the videotaped interview under the residual hearsay exception; *Rojas* first considered the issue of trustworthiness. In finding the videotape to be trustworthy, *Rojas* found as significant the fact that the interviewer asked the child open-ended and non-leading questions. *Id.* at 663. The court noted the non-leading questions asked by the interviewer "were not the kind that would prompt a child to fabricate the responses B.R. gave." *Id.* The court also found as significant the child's detailed account of the abuse and ability to remember specific details such as where other family members were when the abuse occurred. *Id.* (citing *State v. Lonergan,* 505 N.W.2d 349, 355 (Minn. Ct. App. 1993) (child's good memory of details is a circumstantial guarantee of trustworthiness)). In this case, J.G. was similarly asked open-ended and non-leading questions that were not of a type that would prompt a child to fabricate the responses she gave. Furthermore, J.G. gave a very detailed and descriptive account of the alleged abuse she suffered and noted where other family members, such as her sister and Mr. Bentley's wife, were when the abuse supposedly occurred. J.G. described how Mr. Bentley would put spit between her legs and how white stuff came out of his penis and went between her legs. The court in *Rojas* found that similar statements made by the child in that case have a "ring of veracity" because they are "beyond the experience of the average ten-year-old." *Rojas,* 524 N.W.2d at 663. Lastly, like the victim in *Rojas,* J.G.'s statements were consistent

throughout the interview, which enhances the reliability of the statements. *Id.* (citing *Doe v. United States,* 976 F.2d 1071, 1079 (7th Cir. 1992) (reliability is generally enhanced when a child consistently repeats statements)). Therefore, this Court finds that the videotape in this matter has sufficient circumstantial guarantees of trustworthiness.

As for the remaining requirements, the Court concludes that the materiality requirement is clearly met because the videotape contains J.G.'s statement that Mr. Bentley sexually abused her. *Id.* The videotape is also the most probative evidence linking Mr. Bentley to the crime because it is the best direct evidence implicating Mr. Bentley as J.G.'s abuser. *Id.* Mr. Bentley has received adequate notice of the State's intention to use the videotape at trial. The Court is satisfied that admitting the evidence serves the interests of justice, especially considering the fact that J.G. is now deceased. In conclusion, the Court finds that the "appropriate showing of reliability and necessity were made, and admitting the evidence advances the goal of truth-seeking expressed" in the Iowa Rules of Evidence. *Id.* Therefore, the videotape is admissible under the residual hearsay exception of I.R.Evid. 5.803(24).

Mr. Bentley argues that *Rojas* is inapplicable here because this case was decided before *Crawford,* and it relies on the now-overturned case of *Roberts.* However, as the Court stated earlier, *Crawford* is concerned solely with nontestimonial hearsay. *Crawford,* U.S. 51 at 68. Therefore, where nontestimonial

hearsay is present, the analysis in *Roberts* may still be viable. *Id.*; *See also Vaught,* 682 N.W.2d at 327. Moreover, in averring that States should be afforded flexibility in their development of hearsay law regarding nontestimonial statements, *Crawford* notes that a State could exempt such statements from a Confrontation Clause analysis altogether. *Crawford,* U.S. at 68. Thus, the Court's application of the residual hearsay exception and reliance on *Rojas* is not misplaced given the finding that J.G.'s statements were not testimonial.

B. Whether J.G.'s statements are admissible under the medical diagnosis or treatment exception to the hearsay rule, I.R.Evid. 5.803(4)?

Iowa Rule of Evidence 5.803(4) provides:

> Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

I.R.Evid. 5.803(4).

The State relies on the case of *State v. Tracy,* 482 N.W.2d 675, 681 (Iowa 1992) to support its assertion that J.G.'s statements fit within the medical treatment hearsay exception. In *Tracy,* the court declared: "Statements by a child abuse victim concerning the

identity of the abuser made to a physician during an examination are 'reasonably pertinent to diagnosis or treatment' where the abuser is a member of the victim's immediate household." Mr. Bentley argues that *Tracy* is inapplicable here because J.G.'s statements were not made to a physician and Mr. Bentley is not a member of the victim's immediate household. Although one purpose of the interview of J.G. was for medical treatment, the Court is constrained by the interpretation of the medical treatment hearsay exception in *Tracy*. Therefore, the Court must agree with Mr. Bentley and find that *Tracy* does not apply because Ms. Matuszek is not a licensed physician or nurse and Mr. Bentley was not a member of the victim's immediate household.

The State also asserts that the decision by the Iowa Court of Appeals in *State v. Campbell,* 539 N.W.2d 491 (Iowa Ct. App. 1995) applies to this case. *Campbell* involved statements made by a domestic abuse victim to a nurse. Mr. Bentley again argues that this case is inapplicable. The issue before the court in *Campbell* was whether a defendant's right to confrontation is violated by admitting hearsay evidence without first requiring the State to produce the declarant as a witness or establish the declarant's unavailability. *Campbell,* 539 N.W.2d at 493. *Campbell* did not discuss the applicability of the medical diagnosis hearsay exception to the facts of the case. *Id.* The Court agrees with Mr. Bentley and finds that *Campbell* is also inapplicable to the case at hand. Therefore, the Court rejects the State's argument

that the videotape is admissible under the medical diagnosis or treatment hearsay exception.

RULING

In conclusion, the Court finds that J.G.'s statements to Ms. Matuszek during the videotaped interview at St. Luke's Child Protection Center were not testimonial. Since the new rule announced by the United States Supreme Court in *Crawford* is only concerned with testimonial statements, the Court finds that Mr. Bentley's Sixth Amendment Confrontation Clause rights will not be violated by the admission of the videotape of the November 16, 2004, interview. The Court also finds that the videotape is admissible pursuant to the residual hearsay exception in I.R.Evid. 5.803(24) under the reasoning of the Iowa Supreme Court in *Rojas*. The Court determines that the medical diagnosis or treatment hearsay exception is not applicable in this matter.

IT IS, THEREFORE, ORDERED that the videotape of the St. Luke's Child Protection Center November 16, 2004, interview of the alleged victim, minor child J.G., is admissible at trial in this matter.

Clerk to notify counsel.

Dated: May 20, 2005.

/s/ Thomas L. Koehler
THOMAS L. KOEHLER,
Judge of the Sixth
Judicial District of Iowa

4

No. 07-886

2-6-08

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF IOWA,

Petitioner,

vs.

JAMES HOWARD BENTLEY,

Respondent.

On Petition for Writ of *Certiorari* to the Iowa Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI*

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QUESTION PRESENTED

Whether the Iowa Supreme Court correctly decided that the respondent-defendant's right to confront and cross-examine a witness would be violated by allowing an untested videotape of the deceased witness' prior testimonial statement to be used as evidence at trial?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Authorities	iii
Statement of Case	1
Clarification of the Question Presented and of the Record	1
Summary of Argument	4
Argument	5
Petitioner Cannot Articulate a Compelling Reason to Justify Discretionary Review by this Court because the Lower Court Did Not Err in Deciding This Case	
Conclusion	8

TABLE OF AUTHORITIES

page

CASES

Federal Cases

Crawford v. Washington, 541 U.S. 36 (2004) 5,6

Davis v. Washington, 547 U.S. _____ , 126 S.Ct. 2266 (2006) 6

State Cases

Iowa v. Bentley, 739 N.W.2d 296 (Iowa 2007) 1-3,5,6

Minn. v. Krasky, 736 N.W.2d 636 (Minn. 2007) 6

CONSTITUTIONAL PROVISION

Sixth Amendment 1,5,6

RULES OF SUPREME COURT

S.Ct. Rule 10 6

S.Ct. Rule 15.2 1

STATEMENT OF CASE

Clarification of the Question Presented and of the Record

James Bentley, the respondent, has no quarrel with the petitioner's statements regarding opinions below, jurisdiction, and constitutional provision involved at page 1 of the State of Iowa's petition for writ of *certiorari*. Mr. Bentley disagrees with the petitioner's question presented and with some of the claims that the petitioner makes in its statement of case.

The Attorney General for the State of Iowa asks this Court to grant a writ of *certiorari* based on a question that was not ruled on by the Iowa Supreme Court. James Bentley objects to the question as presented by the State of Iowa. S.Ct. Rule 15.2.

The Iowa Supreme Court began its unanimous published opinion with the issue it decided:

> The issue presented in this interlocutory appeal is whether the videotaped statements of J.G., a ten-year old child, are admissible under the Confrontation Clause of the United States Constitution at James Bentley's trial on sexual abuse charges. Because we conclude that J.G.'s statements are testimonial, J.G. is unavailable to testify at trial, and Bentley had no opportunity for cross-examination, we affirm the district court's ruling that the videotaped statements are inadmissible under the Confrontation Clause.

Iowa v. Bentley, 739 N.W.2d 296, 297 (Iowa 2007).

Mr. Bentley's more apt question presented is set out above at page i.

This case involves the State of Iowa's attempt to prosecute James Bentley for alleged sexual abuse of a child. The case is at the pretrial stage. The state

district court granted a defense motion to suppress the alleged child victim's videotaped statement. The Iowa Supreme Court accepted the State's interlocutory appeal. After full briefing and oral argument, the Iowa Supreme Court affirmed the district court's ruling.

The State, at page 2 of its petition, claims that the child protection center, at which the accuser gave her statement, provides "centralized access to services, including medical examinations and psychosocial assessments." The "centralized" nature of the facility also includes providing one central location for all police interrogations of children alleging sexual abuse. The police and medical professionals in Cedar Rapids, Iowa agreed twenty years ago to proceed together, to prevent children from having to go through more than one out-of-court interview. This dual and equal purpose of the child protection center in Cedar Rapids was critical to the Iowa Supreme Court's ruling. The Iowa Supreme Court concluded that "the interview of J.G. was essentially a substitute for police interrogation at the station house." *Iowa v. Bentley*, 739 N.W.2d 296, 299 (Iowa 2007).

The State claims, at page 4 of its petition, that at no point in the interview did the counselor mention "any possibility that Bentley could be punished" for what he allegedly did to J.G. This claim is refuted by the fact that the counselor ended the interview by asking J.G. what should happen to Mr. Bentley, given J.G.'s allegations.

The Attorney General for the State of Iowa, at page 6 of the petition, misstates the record, doing violence to the opinion of the Iowa Supreme Court. The State notes that the hospital counselor "took a break toward the end of the interview" to ask the police and social worker whether she "forgot" to ask any questions. Then, the Attorney General claims that "nothing the counselor asked after the break elicited any further information from J.G." The Iowa Supreme Court's opinion states that "[t]oward the end of the interview, Matuszek told J.G. she was going next door to talk with the police officer and a [social worker] about whether she 'forgot to ask . . . some questions.' When she returned to the interview room, Matuszek asked J.G. additional specific questions about Bentley's conduct." *Iowa v. Bentley*, 739 N.W.2d 296, 300 (Iowa 2007). In fact, J.G. answered the questions requested by the police. The interviewer did elicit additional information.

SUMMARY OF ARGUMENT

The State of Iowa is asking this Court to review a well reasoned and correctly decided case from a lower court so that the State may have guidance on how to get around the Confrontation Clause.

The lower court's unanimous opinion held that a defendant is entitled to suppression of evidence where a child witness' testimony is videotaped, but untested by cross-examination, and the witness is deceased at time of trial. The lower court's opinion detailed significant police involvement during the videotape's creation, resulting in the child's statements being testimonial. The lower court correctly focused on the defendant's rights to confront and cross-examine trial witnesses. The State wants the focus to be from the child's point of view. This would lead to more confusion among lower courts, contrary to the State's claims.

Because the State of Iowa has not and cannot articulate a compelling reason for review in this case, the Court should deny the petition for writ of *certiorari*.

ARGUMENT

Petitioner Cannot Articulate a Compelling Reason to Justify Discretionary Review by this Court because the Lower Court Did Not Err in Deciding This Case

The State of Iowa has not and cannot put forth a compelling reason for this Court to accept discretionary review of the lower court's decision. History shows that this Court accepts cases meant to further significant legal policy considerations. The Court does not generally accept discretionary review to right the wrongs against an individual defendant or alleged victim.

The case of *Iowa v. Bentley* is a straightforward decision by a state supreme court. The defendant's Sixth Amendment right to confront and cross-examine witnesses against him was protected by the state district court's decision. The Iowa Attorney General disagreed with the district court. The State pursued discretionary review by interlocutory appeal. The Iowa Supreme Court accepted the appeal. The parties briefed the case. An *amicus curiae*, supporting the State, also filed a brief. The full Iowa Supreme Court heard oral argument. The court issued a unanimous published opinion several months later.

The State of Iowa requests *certiorari* to the state supreme court. Of primary concern to the State is its claim that this Court's decisions in *Crawford v. Washington*, 541 U.S. 36 (2004),

and *Davis v. Washington*, 547 U.S. ____ , 126 S.Ct. 2266 (2006), have left lower courts in a quandary when statements of unavailable child witnesses are to be offered at trial.

The Court's Rules provide that "review on a writ of *certiorari* is not a matter of right, but of judicial discretion. A petition for a writ of *certiorari* will be granted only for compelling reasons." S.Ct. Rule 10. The State seems to rely, without citation, on Rule 10.b to ask for review by this Court. The State argues that the lower court's opinion in *Iowa v. Bentley*, 739 N.W.2d 296 (Iowa 2007), conflicts with that of *Minn. v. Krasky*, 736 N.W.2d 636 (Minn. 2007). A significant distinction, however, is that there was a police presence of which the child was aware in *Bentley*. In contrast, there were no police present for the interview in *Krasky*.

The Iowa Attorney General argues that this Court's decisions in *Crawford* and *Davis* "provide insufficient guidance on how to determine if children's reports are testimonial . . . ." State's Pet., p. 11. The State of Iowa appears to be seeking guidance from this Court on the best way to circumvent the Sixth Amendment confrontation protections provided to citizens accused. This is a wrong-headed request. Such a review would not further the policies relied upon by the Court in *Crawford* and *Davis*.

The State of Iowa does not and cannot claim that the state supreme court misapplied a properly stated rule of law. Even if that were the case, review in this Court is "rarely granted." S.Ct. Rule 10.

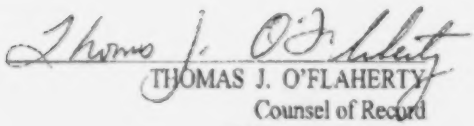
The State concedes that the Iowa Supreme Court's decision held that "admission of J.G.'s statements would violate the Confrontation Clause. In doing so, the Iowa Court found it 'unnecessary' to analyze the purpose of the statements from the child declarant's perspective."

State's Pet., p. 5. Now, the State asks this Court to conduct a review from the State's preferred point of view: that of the child declarant. However, the lower court correctly decided that the paramount focus in a criminal trial is on a citizen's rights to confrontation and cross-examination, not on untested allegations of a deceased child witness.

CONCLUSION

The Court should deny the State of Iowa's petition for writ of *certiorari* for the reasons set out above.

Respectfully submitted,



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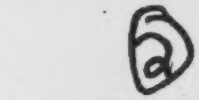
84



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In The
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STATE OF IOWA,

Petitioner,

v.

JAMES HOWARD BENTLEY

Respondent.

On Petition for Writ of Certiorari To The Supreme Court of Iowa

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BRIEF OF THE STATES OF MISSOURI, ALABAMA, ALASKA, ARKANSAS, COLORADO, DELAWARE, HAWAII, IDAHO, INDIANA, KANSAS, MARYLAND, MICHIGAN, MISSISSIPPI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW MEXICO, NORTH DAKOTA, OKLAHOMA, OREGON, SOUTH DAKOTA, TENNESEE, TEXAS, UTAH, VERMONT, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICI 1

REASONS FOR GRANTING THE PETITION 2

1. The question decided by the Iowa Supreme Court is faced in all states. 2

2. In order to properly protect and treat abused children, the states need to know the rules regarding interviews. 7

CONCLUSION 13

TABLE OF AUTHORITIES

CASES

Agilera v. State, 862 N.E.2d 298 (Ind. App. 2007) 5

Cabinet for Health and Family Services v. A.G.G., 190 S.W.3d 338 (Ky. 2006) 7

Commonwealth v. Allshouse, 924 A.2d 1215 (Pa. Super. 2007)..... 6

Commonwealth v. DeOliveira, 849 N.E.2d 218 (Mass. 2006) 6

Crawford v. Washington, 541 U.S. 36 (2004) ..passim

Flores v. State, 120 P.3d 1170 (Nev. 2005)..... 6

Hernandez v. State, 946 So.2d 1270 (Fla. App. 2007)..... 5

Idaho v. Wright, 497 U.S. 805 (1990) 4, 5

In re P.F., 118 P.3d 224 (Okla. Civ. App. 2005) 7

Lollis v. State, 232 S.W.3d 803 (Tex. App. 2007) 6

M.R.D. v. T.D., --- So.2d ---, 2008 WL 203761 (Ala. Civ. App. 2008)..... 12

People v. Geno, 683 N.W.2d 687 (Mich. App. 2004) .. 6

People v. Moreno, 160 P.3d 242 (Col. 2007)..... 3

People v. Sandefur, --- N.E.2d ---, 2007 WL 4593193 (Ill. App. 4 Dist. 2007)..... 12

People v. Sharp, 155 P.3d 577 (Colo. App. 2006)..... 5

People v. Sisavath, 118 Cal.App.4th 1396 (2004)..... 5

People v. Stechly, 870 N.E.2d 333 (Ill. 2007)..... 5

Potter v. Greene, ---So.2d---, 2008 WL 131993 (Miss. App. 2008)..... 12

Randall v. State, 907 A.2d 146 (Del. Supr. 2006)..... 7

Seely v. State, --- S.W.3d ---, 2007 WL 2781965 (Ark. App. 2007)..... 5

Snowden v. State, 867 A.2d 314 (Md. 2005)..... 5

Starr v. State, 604 S.E.2d 297 (Ga. App. 2004)..... 7

State v. Arroyo, 935 A.2d 975 (Conn. 2007)..... 6

State v. Bentley, 739 N.W.2d 296 (Iowa 2007)..... 5

State v. Blue, 717 N.W.2d 558 (N.D. 2006)..... 6

State v. Brigman, 632 S.E.2d 498 (N.C. App. 2006).. 6

State v. Buda, 912 A.2d 735 (N.J. Super. A.D. 2006) 6

State v. Carothers, 724 N.W.2d 610 (S.D. 2006)..... 7

State v. D.H., 2007 WL 3293361 (Ohio App. 10 Dist. 2007)..... 6

State v. Henderson, 160 P.3d 776 (Kan. 2007)..... 5

State v. Hooper, --- P.3d ---, 2007 WL 4472263 (Idaho 2007)..... 5

State v. Hopkins, 154 P.3d 250 (Wash. App. 2007)... 6

State v. Justus, 205 S.W.3d 872 (Mo. banc 2006)..... 6

State v. Kennedy, 957 So.2d 757 (La. 2007)..... 5

State v. Krasky, 736 N.W.2d 636 (Minn. 2007) 6

State v. Neese, 2006 WL 3831387
(Tenn. Crim. App. 2006) 6

State v. Pitt, 147 P.3d 940 (Or. App. 2006)..... 6

State v. Spencer, 169 P.3d 384 (Mont. 2007)..... 6

State v. Tailo, 2007 WL 4226066 (Haw. 2007)..... 7

State v. Tester, 895 A.2d 215 (Vt. 2006)..... 7

State v. Vaught, 682 N.W.2d 284 (Neb. 2004)..... 6

T.P. v. State, 911 So.2d 1117
(Ala. Crim. App. 2004)..... 5

White v. Illinois, 502 U.S. 346 (1992) 4, 5

Williams v. State, 970 So.2d 727 (Miss. App. 2007).. 6

Woodard v. State, 496 S.W.2d 896 (Ga. 1998)..... 3

Zukowski v. State, 20087 WL 110096
(Tenn. Crim. App. 2008) 12

STATUTES AND RULES

42 Pa. Cons. Stat. Ann. § 5985.1 (West 2000)..... 3

725 Ill. Comp. Stat. Ann. 5/115-10 (West 2002)..... 3

Ala. Code 1975 §§ 15-25-31 and 31 (West 1995)..... 2

Alaska R. Evid. 801(d)(3) 2

Alaska Stat. § 12.40.110 (Lexis 2006) 2

Ariz. Rev. Stat. Ann § 13-1416 (West 2001) 3

Ark. R. Evid. 803(25) 3

Cal. Evid. Code § 1228 (West 1995) 3

Colo. Rev. Stat. § 13-25-129 (1998) 3

Del. Code Ann. Tit. 11, § 3513(a) (2007) 3

Fla. Stat. Ann. § 90.803(23) (2007) 3

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Idaho Code § 19-3024 (Michie 2004) 3

Ind. Code Ann. § 35-37-4-6 (Michie 1998) 3

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N.D. R. Evid. 803(24) 3

N.H. Rev. Stat. Ann. § 516:25-a (2007) 3

N.J. R. Evid. 803(27) 3

Nev. Rev. Stat. § 51.385 (2000) 3

Ohio R. Evid. 807 3

Okla. Stat. Ann. Tit. 12 § 2803.1 (West 1993) 3

R.I. Gen. Laws § 11-37-13.1 (2002) 3

S.C. Code Ann § 17-23-175 (2007) 3

S.D. Codified Laws § 19-16-38 (2007) 3

Tex. Crim. Proc. Code Ann. § 38.072 (West 2005) 3

Utah Code Ann. § 76-5-411 (2003) 3

Wash. Rev. Code Ann. § 9A.44.120 (West 2000) 3

Wis. Stat. Ann. § 908.08 (2007) 3

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Chicago Children's Advocacy Center, *Mission and Vision* 9

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N. Faulkner, *Sexual Abuse Statistics* 11

National Children's Alliance, *Current Listing of Member Children's Advocacy Centers* 12

Susan Sachsenmaier, *Investigating Child Sexual Abuse Allegations: Do Experts Agree on Anything?* 10

The National Children's Advocacy Center, *The CAC Model* 9, 10, 11

INTEREST OF AMICI

The question presented by the State of Iowa is of great importance to law enforcement. The amici attorneys general are the chief law enforcement officers of their respective states. In many instances, they represent the state in prosecutions that involve out-of-court statements made by children. In even more instances, the attorneys general are assigned responsibility for appeals that arise from criminal cases in which statements from children were used.

But the question presented is not just important to law enforcement. It is also important to social services, mental health, and medical personnel who deal with the aftermath of child abuse. The states employ such personnel. The attorneys general thus need to know what kinds of statements made by children can be used at a criminal trial not just in order to represent the states in criminal cases, but also to counsel and represent state employees and officials whose roles lie outside the criminal realm.

REASONS FOR GRANTING THE PETITION

1. The question decided by the Iowa Supreme Court is faced in all states.

Every state's courts are faced with the question of the admissibility of child statements. It is critical for those courts to have concrete, uniform guidance – of the sort only this Court can provide – as to how to determine the admissibility of a child's out-of-court statement made to child welfare advocates, such as counselors, social workers, child advocacy center interviewers, mental health professionals, medical professionals, and educators. Because this Court has not spoken on that important question since it decided *Crawford v. Washington,* 541 U.S. 36 (2004), we have seen varying standards and inconsistent results, as described in the Petition.

That there have been a number of cases already addressing the admissibility of child statements post-*Crawford* is hardly surprising. The states have long recognized the necessity of admitting a child's out-of-court statements in certain cases, particularly abuse cases. States have "a strong interest in protecting children, and child abuse presents unusual evidentiary problems because the victim's testimony is often the only direct evidence linking the accused to the crime." *State v. Wright*, 751 S.W.2d 48, 52 (Mo. 1988). For these reasons, a majority of states have enacted, via statute or rule, what is commonly known as a "tender-years" statute, which allows for admission of a child's out-of-court statements provided certain criteria are met.[1]

---

[1] *See, e.g.*, Ala. Code 1975 §§ 15-25-31 and 31 (West 1995); Alaska R. Evid. 801(d)(3); Alaska Stat. § 12.40.110 (Lexis 2006) (only applies to grand jury testimony); Ariz. Rev. Stat. Ann § 13-1416 (West 2001); Ark. R. Evid. 803(25); Cal. Evid. Code § 1228 (West 1995); Colo. Rev. Stat. § 13-25-129 (1998) (held unconstitutional in *People*

Such rules or statutes reflect "a policy determination that in some child abuse cases the victim's out-of-court statements may possess sufficient probative value to contribute to the judicative process." *Wright*, 751 S.W. 3d at 52. "[I]ndeed, such statements may on occasion be *more* reliable than the child's testimony at trial, which may suffer distortion by the trauma of the courtroom setting or become contaminated by contacts and influences prior to trial." *Id.* (emphasis in original). Thus, prior to this Court's decision in *Crawford*, a child's statements to a social worker, a counselor, or a mental health care provider, or to an interviewer at a children's advocacy center, were generally deemed admissible, assuming there were sufficient indicia of reliability. Indeed, this Court itself recognized the admissibility of some such statements in *Idaho v. Wright*, 497 U.S. 805 (1990), and allowed their admission in *White v. Illinois*, 502 U.S. 346 (1992).

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v. Moreno, 160 P.3d 242 (Col. 2007) (citing *Crawford v. Washington*, 541 U.S. 36 (2004)); Del. Code Ann. Tit. 11, § 3513(a) (2007) (providing for videotaped deposition instead of live testimony); Fla. Stat. Ann. § 90.803(23) (2007); Ga. Code Ann. § 24-3-16 (1995) (held unconstitutional in *Woodard v. State*, 496 S.W.2d 896 (Ga. 1998)); Haw. R. Evid. 804(b)(6); Idaho Code § 19-3024 (Michie 2004); 725 Ill. Comp. Stat. Ann. 5/115-10 (West 2002); Ind. Code Ann. § 35-37-4-6 (Michie 1998); Iowa Code Ann. § 232.96 (West 2006) (only applies to child protective proceedings); Kan. Stat. Ann § 22-3433 (2005); Md. Code Crim. Proc. § 11-304 (Lexis 2001); Mass. Gen. Laws Ann ch. 233 § 81 (Lexis 2000); Mich. R. Evid. 803A; Minn. Stat. Ann. § 595.02 (West 2000) (providing for testimony via closed circuit television); Miss. R. Evid. 803(25); Mo. Rev. Stat. § 491.075 (2000); Nev. Rev. Stat. § 51.385 (2000); N.H. Rev. Stat. Ann. § 516:25-a (2007) (only applies to civil suits for damages arising out of child sexual abuse); N.J. R. Evid. 803(27); N.D. R. Evid. 803(24); Ohio R. Evid. 807; Okla. Stat. Ann. Tit. 12 § 2803.1 (West 1993); 42 Pa. Cons. Stat. Ann. § 5985.1 (West 2000); R.I. Gen. Laws § 11-37-13.1 (2002); S.C. Code Ann § 17-23-175 (2007); S.D. Codified Laws § 19-16-38 (2007); Tex. Crim. Proc. Code Ann. § 38.072 (West 2005); Utah Code Ann. § 76-5-411 (2003); Wash. Rev. Code Ann. § 9A.44.120 (West 2000); Wis. Stat. Ann. § 908.08 (2007).

In *Crawford*, the Court adopted a new framework for adjudicating the admissibility of out-of-court statements under the Confrontation Clause, holding that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." 541 U.S. at 68-69. Simply put, under *Crawford*, "testimonial" statements are no longer admissible unless the witness takes the stand or the defendant has had a prior opportunity to cross-examine the witness.

The issue for prosecutors and the courts becomes, then, what constitutes a "testimonial" statement. This Court did not adopt a definition of "testimonial" in *Crawford*. In fact, this Court specifically stated that it would "leave for another day any effort to spell out a comprehensive definition of 'testimonial,'" fully aware that this would create uncertainty. *Id.* at 68, n. 10. Rather, this Court merely stated that the term "testimonial" applied "at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.* at 68. This Court noted that these were "the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." *Id.* at 68.

But inasmuch as a child's statement to a social worker, children's advocacy center interviewer, medical professional, or mental health professional does not constitute prior testimony in a court proceeding or a police interrogation, the uncertainty remains as to whether such a statement is "testimonial" for the purposes of *Crawford* and the Confrontation Clause. Moreover, in *Crawford*, this Court did not expressly overturn *Idaho v. Wright* and *White v. Illinois*, under which at least some such out-of-court statements were admissible. Given the apparent continued validity of *Idaho v. Wright* and *White v. Illinois,* and the limited

holding in *Crawford*, state courts across the country have been and will continue to be faced with the question of how to determine whether a child's out-of-court statements to child welfare advocates is "testimonial."

The impact of the issue is obvious in the 30 states where the courts have tackled the issue in cases involving various kinds of interviewers – and have reached contradictory holdings.[2] But the issue will

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[2] In the following cases, the court held that the statement was testimonial: *T.P. v. State*, 911 So.2d 1117 (Ala. Crim. App. 2004) (holding that statements to social worker and forensic evaluator were testimonial; however, any error was harmless in light of the defendant's admissions); *Seely v. State*, --- S.W.3d ---, 2007 WL 2781965 (Ark. App. 2007) (holding that statements to social worker were testimonial, but that statements to mother were not testimonial); *People v. Sisavath*, 118 Cal.App.4th 1396 (2004) (holding that statements during an interview at a multi-disciplinary interview center were testimonial); *People v. Sharp*, 155 P.3d 577 (Colo. App. 2006) (holding that statements to private forensic interviewer were testimonial); *Hernandez v. State*, 946 So.2d 1270 (Fla. App. 2007) (holding that statements to nurse were testimonial); *State v. Hooper*, --- P.3d ---, 2007 WL 4472263 (Idaho 2007) (holding that statements to forensic examiner were testimonial); *People v. Stechly*, 870 N.E.2d 333 (Ill. 2007) (holding that statements to clinical specialist and school social worker were testimonial; however, statements to mother were not testimonial); *Agilera v. State*, 862 N.E.2d 298 (Ind. App. 2007) (holding that statements to forensic interviewer were testimonial, but that their admission did not violate the confrontation clause because the child testified at trial); *State v. Bentley*, 739 N.W.2d 296 (Iowa 2007) (holding that statements to counselor at Child Protection Center were testimonial); *State v. Henderson*, 160 P.3d 776 (Kan. 2007) (holding that statements to social worker and detective were testimonial); *State v. Kennedy*, 957 So.2d 757 (La. 2007) (holding that statements to Children's Advocacy Center worker were testimonial, but there was no confrontation violation because the child testified at trial); *Snowden v. State*, 867 A.2d 314 (Md. 2005) (holding that statements to social worker were testimonial); *Williams v. State*, 970 So.2d 727 (Miss. App. 2007) (holding that statements to forensic interviewer at a Family Crisis Center were testimonial, but their admission was not harmful because the victim

inevitably be presented in the other states as well. In fact, out-of-court statements by children to counselors and others have already come before the appellate courts

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testified at trial); *State v. Justus*, 205 S.W.3d 872 (Mo. banc 2006) (holding that statements to social worker and Children's Advocacy Center interviewer were testimonial); *State v. Buda*, 912 A.2d 735 (N.J. Super. A.D. 2006) (holding that statements to worker from Department of Youth and Family Services were testimonial); *Flores v. State*, 120 P.3d 1170 (Nev. 2005) (holding that statements to child protective services investigator were testimonial); *State v. Blue*, 717 N.W.2d 558 (N.D. 2006) (holding that statements to forensic interviewer were testimonial); *State v. Pitt*, 147 P.3d 940 (Or. App. 2006) (holding that statements to director at Child Advocacy Center were testimonial); *State v. Neese*, 2006 WL 3831387 (Tenn. Crim. App. 2006) (holding that statements to interviewer at Children's Advocacy Center were testimonial); *State v. Hopkins*, 154 P.3d 250 (Wash. App. 2007) (holding that statements to Child Protective Services workers were testimonial but that statements to family members were not testimonial).

A strong minority of courts, however, have found this type of statement to be non-testimonial and therefore admissible: *State v. Arroyo*, 935 A.2d 975 (Conn. 2007) (holding that statements to licensed social worker were not testimonial); *Commonwealth v. DeOliveira*, 849 N.E.2d 218 (Mass. 2006) (holding that statements to emergency room doctor were not testimonial); *People v. Geno*, 683 N.W.2d 687 (Mich. App. 2004) (holding that statements to Children's Advocacy Center director were not testimonial); *State v. Krasky*, 736 N.W.2d 636 (Minn. 2007) (holding that statements to nurse were not testimonial); *State v. Spencer*, 169 P.3d 384 (Mont. 2007) (holding that statements to counselor and foster parent were not testimonial); *State v. Vaught*, 682 N.W.2d 284 (Neb. 2004) (holding that statements to doctor for purposes of medical diagnosis were not testimonial); *State v. Brigman*, 632 S.E.2d 498 (N.C. App. 2006) (holding that statement to doctor was not testimonial where 2-year-old would not know statement would be used later at trial); *State v. D.H.*, 2007 WL 3293361 (Ohio App. 10 Dist. 2007) (holding that statements to social worker at Children's Advocacy Center were not testimonial); *Commonwealth v. Allshouse*, 924 A.2d 1215 (Pa. Super. 2007) (holding that statements to Children and Youth Services worker were not testimonial); *Lollis v. State*, 232 S.W.3d 803 (Tex. App. 2007) (holding that statements to counselor were not testimonial).

in post-*Crawford* cases in seven more states, though there the courts have been able to avoid deciding it.[3] There is no realistic hope that the courts in those states will be able to postpone indefinitely addressing the issue, nor that courts in the remaining 13 states will be able to avoid having to address it. And given the conflict among the states, there is no real hope for a consistent nationwide rule absent guidance from this Court.

2. In order to properly protect and treat abused children, the states need to know the rules regarding interviews.

Interviews such as those conducted by St. Luke's Child Protection Center in this case are critical for the proper protection and treatment of abused children. But interviews about sensitive topics, by whomever conducted, are often difficult for children. Professionals at children's advocacy centers explain some of the things that make interviews difficult:

> The child might be afraid to tell because the abuser hurt or threatened to hurt the

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[3] *See, e.g.*, *Randall v. State*, 907 A.2d 146 (Del. Supr. 2006) (holding that statements were admissible where child testified and defendant opted not to cross-examine); *Starr v. State*, 604 S.E.2d 297 (Ga. App. 2004) (holding that statements were admissible where child did not testify but was present and available at trial); *State v. Tailo*, 2007 WL 4226066 (Haw. 2007) (holding that statements were admissible where child testified at trial); *Cabinet for Health and Family Services v. A.G.G.*, 190 S.W.3d 338 (Ky. 2006) (holding that statements were admissible because *Crawford* not applicable to termination of parental right cases); *In re P.F.*, 118 P.3d 224 (Okla. Civ. App. 2005) (holding that statements were inadmissibile for statutory reasons); *State v. Carothers*, 724 N.W.2d 610 (S.D. 2006) (holding that statements were admissible where child was available to testify at trial); *State v. Tester*, 895 A.2d 215 (Vt. 2006) (holding that statements were admissible where child testified at trial).

> child or family members. The abuser might have also threatened to hurt [themself] if the child tells. Children might think if they tell they will be taken away from their family or have to move. Children are also sensitive to others and might not say something because they don't want their family to feel sad or angry about the abuse. Some children believe the abuser loves them and/or they don't want to lose their relationship. The child might also keep the abuse a secret because the abuser made them promises or gave them gifts or rewards so they wouldn't tell anyone about the abuse. Other children might believe the abuse is normal. They may also feel too ashamed or embarrassed to tell anyone about the abuse.

Chicago Children's Advocacy Center, *What to Do If You Suspect a Child Is Being Abused*, http://www.chicagocac.org/index.php/resources/what_to_do_if_you_suspect_a_child_is_being_abused, last accessed on February 6, 2008.

Children's advocacy centers were created, in part, to address those difficulties. The centers facilitate disclosure by children and successful intervention on behalf of those children who have, in fact, been abused. Children's advocacy centers were created in recognition that "child abuse is a multifaceted community problem and no single agency, individual or discipline has the necessary knowledge, skills or resources to serve the needs of all children and their families." The National Children's Advocacy Center, *The CAC Model*, http://www.nationalcac.org/professionals/model/cac_model.html, last accessed on February 6, 2008 ("*The CAC Model*"). Thus they provide child-focused programs

where representatives from many disciplines – child protection, mental health, medical, victim advocacy, as well as law enforcement and prosecution – work together, conducting joint interviews and making team decisions about the investigation, treatment, management, and, potentially, prosecution of child abuse cases. *See id.* "They also share a belief that the combined wisdom and professional knowledge of professionals of different disciplines will result in a more complete understanding of case issues and the most effective, child and family-focused system response." *Id.* Children's advocacy centers employ a multi-disciplinary approach that provides victims and their families with medical services, social services, and legal services to deal with the trauma of abuse. *See id.*

"The primary goal of all [children's advocacy centers] is to ensure that children are not further victimized by the intervention systems designed to protect them." *Id.* The centers and the professionals who work therein strive to develop a program that responds to allegations of child abuse in a way "designed to meet the needs of children and their families in a specific community." *Id.* Thus, the centers serve the child, as the team's primary concern is to act in the best interest of the child. Chicago Children's Advocacy Center, *Mission and Vision*, http://www.chicagocac.org/index.php/about/mission_vision, last accessed on February 6, 2008.

The interview is an essential part of this program. It is conducted by a professional, who is trained in the particulars of successfully interviewing children. Experts in child sexual abuse investigations agree that "[a] well-trained and experienced forensic interviewer ... should conduct the investigation [because t]his will yield more informative and accurate accounts by children." Susan Sachsenmaier, *Investigating Child Sexual Abuse Allegations: Do Experts Agree on Anything?*, http://www.aaets.org/article50.htm (The American Academy of

Experts in Traumatic Stress, Inc., 1998). Interviews performed by a children's advocacy center serve the needs of treating physicians, treating therapists, and civil child protection professionals, as well as potentially, but not necessarily, serving the needs of prosecutors. The interview is designed to prevent "trauma to the child caused by multiple, duplicative contacts with different professionals." *The CAC Model*, *supra*.

Before the advent of children's advocacy centers, sexually abused children often had to tell their stories over and over – repeatedly reliving the trauma of their abuse. Research shows that in Chicago, for example, a child would have to retell what happened to him or her an average of 16 times. Chicago Children's Advocacy Center, *Before the CCAC: A Broken System*, http://www.chicagocac.org/index.php/about/history/before_the_ccac_a_broken_system/, last accessed on February 6, 2008. By allowing the involvement of law enforcement personnel behind the scenes, children's advocacy centers significantly reduce the number of potentially traumatic interviews – and thus enhance the ability of state employees and others to treat abused children.

And the extent of the need for medical, mental health, and other non-prosecutorial intervention is staggering. In 2005, an estimated 899,000 children were the victims of abuse or neglect; 9.3% (over 83,000) of these were sexually abused. Children's Bureau, *Child Maltreatment* (2005), available at http://www.acf.hhs.gov/programs/cb/pubs/cm05/chapterthree.htm, last accessed February 6, 2008. The overall victimization rate of children is inversely related to the age group of the child, with younger children being the most likely group to be victimized. *Id.* Early identification of sexual abuse victims is crucial "to the reduction of suffering of abused youth and to the establishment of support systems for assistance in pursuing appropriate psychological development and

healthier adult functioning. As long as disclosure continues to be a problem for young victims, then fear, suffering, and psychological distress will, like the secret, remain with the victim." N. Faulkner, *Sexual Abuse Statistics*, http://www.prevent-abuse-now.com/stats.html #Substantiated, last accessed February 6, 2008.

Communities with children's advocacy centers report "more immediate follow-up to child abuse reports; more efficient medical and mental health referrals; reduction in the number of child interviews; increased successful prosecutions; and consistent support for child victims and their families." *The CAC Model*, *supra*. That communities with children's advocacy centers report "increased successful prosecutions" does not change the fact that those centers and the interviews they conduct perform an important role in treatment. Each center "ensures that children receive child-focused services in a child friendly environment - one in which the needs of children and families come first." *Id*.

St. Luke's Child Protection Center, the children's advocacy center involved here, is but one of nearly 700 children's advocacy centers in the United States. Such centers are found in literally every state of the union and in the District of Columbia. *See* National Children's Alliance, *Current Listing of Member Children's Advocacy Centers*, http://www.nca-online.org/pages/page.asp?page_id=3999, last accessed on February 6, 2008. Since 2004, there have been nearly 500 reported decisions, civil and criminal, in which children's advocacy centers were referenced or involved.[4]

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[4] A date limited Westlaw terms and connecters search in the all state cases database using the search string "Child Advocacy Center" resulted in a list of 449 documents. Among the most recent *M.R.D. v. T.D.*, --- So.2d ---, 2008 WL 203761 (Ala. Civ. App. 2008) (termination of parental rights); *People v. Sandefur*, --- N.E.2d ---, 2007 WL 4593193 (Ill. App. 4 Dist. 2007) (sexual abuse and sexual

Children's advocacy centers such as St. Luke's, as well as myriad other methods of bringing treatment teams and law enforcement together, help communities across the country address the moral imperative of protecting the nation's most vulnerable citizens from abuse. The interviews they perform are indispensable tools in the assessment and treatment of abused children. Those performing such interviews need to know – as soon as possible, and with specificity – just how much and in what ways they can involve law enforcement personnel. To answer that they cannot involve law enforcement personnel at all would be very troubling. But the existing uncertainty may have the same impact: requiring mental health, social services, and child care professionals to abandon their goal of crafting the interview process in the manner best suited to serve the needs of children.

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assault); *Potter v. Greene*, ---So.2d ---, 2008 WL 131993 (Miss. App. 2008) (child custody); *Zukowski v. State*, 2008 WL 110096 (Tenn. Crim. App. 2008) (child rape).

CONCLUSION

For the reasons stated above, the Court should grant the Petition.

Respectfully submitted,

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14

1-29-08 ACBE

3

No. 07-886

IN THE
Supreme Court of the United States

STATE OF IOWA,

Petitioner,

v.

JAMES HOWARD BENTLEY,

Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of Iowa

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF AMICUS CURIAE NATIONAL DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF PETITIONER

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MOTION OF THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Pursuant to Rule 37 of the Rules of this Court, the National District Attorneys Association respectfully requests leave to file the accompanying brief as amicus curiae in support of petition for writ of certiorari in the matter of State of Iowa vs., Howard Bentley. Petitioner Iowa Attorney General's Office has consented to the filing of this brief, but Respondent, James Howard Bentley, through his Attorney Thomas O'Flaherty has withheld consent, necessitating this motion.

As described in the statement of interest in the attached proposed amicus curiae brief, the National District Attorneys Association is the largest and primary professional association of prosecuting attorneys in the United States. The Association presently has approximately 6, 500 members, including most of the nation's local prosecutors, plus assistant prosecutors, investigators, victim witness advocates and paralegals. The mission of the National District Attorneys Association is to be the voice of America's prosecutors and to support their efforts to protect the rights and safety of the people.

As amicus curiae, the National District Attorneys Association is uniquely positioned to witness the impact that the recent United States Supreme Court decision in *Crawford* and *Davis* has had on child abuse prosecutions in this country. The National District Attorneys Association conducts national trainings on the impact of the *Crawford*

decision and answers a multitude of technical assistance questions from child abuse prosecutors about the impact the *Crawford* and *Davis* decisions have had on child abuse investigation and prosecution. As a result it has become apparent to the National District Attorneys Association, due to the present legal uncertainty in Iowa and nationally of statements of child victims, that prosecutors across this country are eager for a resolution of the precise analysis to be utilized to determine the legal status of children's statements.

In addition, the National District Attorneys Association is well positioned to provide relevant studies in child development that can shed light on the cognitive capabilities of children the age of the child in the present case in an effort to urge this Honorable Court to adopt a "reasonable child" standard.

For these reasons, the National District Attorneys Association respectfully requests that its motion for leave to file the accompanying brief as amicus curiae be granted.

Respectfully submitted,

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES.....ii

INTEREST OF AMICUS CURIAE.....1

SUMMARY OF ARGUMENT.....4

ARGUMENT.....4

I. A ten-year old child victim, functioning at the level of a seven year old, cannot reasonably expect or anticipate that statements she made to a hospital counselor, immediately preceding a physical medical exam, would later be used prosecutorially, therefore, this Honorable Court should adopt a "reasonable child" standard when evaluating children's statements pursuant to *Crawford v. Washington*, 541 U.S. 36 (2004).....4

II. Child development research studies demonstrate that young children do not understand judicial players and processes and, therefore, supports the adoption of a "reasonable child" standard. 8

CONCLUSION.....25

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Crawford v. Washington, 541 U.S. 36 (2004).....*passim*

Davis v. Washington, 543 U.S. ___, 126 S.Ct. 2266 (2006).....*passim*

STATE CASES

Commonwealth v. DeOliveira, 849 N.E.2d 218 (Mass. 2006).....8

In re S.R., 920 A. 2d 1262 (PA. Super. 2007).....5

Lollis v. State, 232 S.W. 3d 803 (Tex. Ct. App. – Texarkana 2007).....6

McDonald v. State, 2006 Tex. App. LEXIS 7416.....8

People v. Cage, 56 Cal. Rptr. 3d 789 (Cal. 2007).....5

People v. Stechly, 870 N.E. 2d 333 (Ill. 2007).....7

People v. Vigil, 127 P. 3d 916 (Colo. 2006).....8

State v. Bentley, 739 N.W. 2d 296 (Iowa 2007).....5, 9

State v. Bobadilla, 709 N.W. 2d 243 (Minn. 2006).....6, 7

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State v. Johnson, 2006 Ohio 5195.....7

State v. Krasky, 736 N.W. 2d 636 (Minn. 2007).....5, 7

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Symposium, Child Abuse: *Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony*, 23 Pacific Law Journal 3 (1996).....9

Warren-Leubecker, Amye, Carol S. Tate, Ivora D. Hinton and Nicky Ozbek, *What Do Children Know about the Legal System and When Do They Know It? First Steps Down a Less Traveled Path in Child Witness Research, Perspectives on Children's Testimony* 158-183 (S.J. Ceci, D.F. Ross & M.P Toglia eds., (1989).....18

INTEREST OF AMICUS CURIAE

The National District Attorneys Association is the largest and primary professional association of prosecuting attorneys in the United States.[1] The association presently has approximately 6,500 members, including most of the nation's local prosecutors, plus assistant prosecutors, investigators, victim advocates and paralegals. The mission of the National District Attorneys Association is to be the voice of America's prosecutors and to support their efforts to protect the rights and safety of the people. In doing so, the National District Attorneys Association provides professional guidance and support to its members, serves as an education and resource center, follows public policy issues involving criminal justice and law enforcement and produces a number of publications. As amicus curiae, the National District Attorneys Association is exceptionally positioned to witness the impact that the recent United States Supreme Court decisions in *Crauford* and *Davis* have had on child abuse prosecutions in this country.

The American Prosecutors Research Institute's National Center for Prosecution of Child Abuse, a division of the National District Attorneys Association, has received a multitude of technical

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[1] Counsel of Record for all parties received notice at least ten days prior to the due date of the amicus curiae's intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

assistance questions and training requests from child abuse prosecutors on the admissibility of child victim and witness statements since the decision in *Crawford v. Washington*, 541 U.S. 36 (2004). To respond to such requests, the National District Attorneys Association provides both nationwide trainings as well as staff designated to answer *Crawford* related technical assistance questions. Since the *Crawford* decision was announced in 2004, the National Center for Prosecution of Child Abuse has conducted approximately 58 trainings concerning the impact of the *Crawford* decision on child abuse prosecutions in 26 states and the United States Territory of Guam, reaching approximately 8,000 prosecutors, law enforcement and allied professionals. In addition, the National Center for Prosecution of Child Abuse has produced an outline of post-*Crawford* cases that now has blossomed to approximately 400 pages with over 140 subsections. Approximately 1,000 state and federal prosecutors have registered to utilize this outline and have received a username and password. In the last nine months of 2007, the National District Attorneys Association website received over 1,000 hits and downloads of the *Crawford* outline that was developed to assist front-line prosecutors. It is not unusual, as prosecutors attend a *Crawford* training sponsored by the National District Attorneys Association or contact the association with technical assistance questions, to ponder whether per *Crawford* and *Davis*, a child's statements are to be analyzed like that of an adults. Furthermore, child abuse prosecutors are seeking guidance on the issue of whether or not their established child abuse investigation and prosecution protocols warrant

modification per the *Crawford* and *Davis* rulings. A major query from child abuse prosecutors nationally is the role that law enforcement may now play in the multidisciplinary forensic interview of a child victim in light of the *Crawford* and *Davis* rulings. Since lower Courts are divided on admissibility of child statements, amicus curiae urges this Honorable Court to clarify the analysis necessary to determine the testimonial nature of a statement of a child victim or witness. It is apparent to amicus curiae that prosecutors across this country are hungry for a workable legal analysis of the admissibility of various forms of children's out of court statements.

Due to the present legal uncertainty in Iowa and nationally of the admissible statements of child victims, the National District Attorneys Association urges this Honorable Court to grant Writ of Certiorari to Petitioner State of Iowa and to adopt a reasonable child standard for children's statements. To further this request, amicus curiae is well positioned to provide relevant studies in child development that can shed light on the cognitive capabilities of children the age of the child witness in this case. Since the United States Supreme Court has yet to examine a child abuse case in light of the *Crawford* and *Davis* rulings, amicus curiae has a public interest in supporting the Petitioner's request for Writ of Certiorari and the Petitioner's position that the decision by the Supreme Court of Iowa be reversed and the statements of the minor child be allowed into evidence.

SUMMARY OF ARGUMENT

The Supreme Court of Iowa erred in ruling that statements made by a ten year-old sexual assault victim to a hospital counselor were "testimonial statements" within the meaning of *Crawford v. Washington*, 541 U.S. 36, 158 L.Ed.2d 177, 124 S. Ct. 1354 (2004) and, therefore, inadmissible at trial. Lower courts are divided nationally on the precise standard to be utilized in analyzing statements of child victims and witnesses. For these reasons, the United States Supreme Court should grant State of Iowa's petition for Writ of Certiorari and adopt a reasonable child standard in determining the testimonial nature of children's statements.

ARGUMENT

I. A ten-year old child victim, functioning at the level of a seven year old, cannot reasonably expect or anticipate that statements she made to a hospital counselor, immediately preceding a physical medical exam, would later be used prosecutorially, therefore, this Honorable Court should adopt a "reasonable child" standard when evaluating children's statements pursuant to *Crawford*.

Since the United States Supreme Court has yet to review a child abuse case on the issue of the admissibility of child victim's statements, prosecutors and judges are left with conflicting standards for determining whether or not these statements are testimonial.

In the instant case, the Iowa Supreme Court, utilizing a "primary purpose" analysis ruled that though police were present and did not actually interview the ten- year old child victim, that the statements of the child were testimonial and violated the defendant's right of confrontation afforded by the Sixth Amendment of the United States Constitution. See *State v. Bentley*, 739 N.W. 2d 296 (Iowa 2007) – child interviewed by a hospital counselor preceding a medical examination. This ruling is in sharp contrast to a case which possesses similar facts to the *Bentley* case. In the case of *State v. Krasky*, 736 N.W. 2d 636 (2007) also utilizing a "primary purpose" analysis, the Minnesota Court of Appeals ruled that the statements made by a child victim to a nurse in conjunction with a medical examination were non-testimonial. The fact that such factually similar cases were decided differently in separate jurisdictions is illustrative of the urgent need for this Honorable Court to clarify the standard to be utilized in the analysis of the statements of a child victim. The Iowa Supreme Court is but one of many of the nation's highest state courts to utilize the primary purpose test in determining the nature of a child's statement during a forensic interview. See *People v. Cage*, 56 Cal. Rptr. 3d 789 (Cal. 2007). See *In re S.R.*, 920 A. 2d. 1262 (PA. Super. 2007) The primary purpose test, as indicated by *Davis v. Washington*, 513 U.S. ___, 126 S. Ct. 2266 (2006) and in footnote two and five of the decision is not applicable in the instant case as a proper analysis since the facts of the instant case did not involve an interrogation by law enforcement and did not involve facts similar to those in *Davis*, (not involving adult victim or emergency in progress).

It is the contention of amicus curiae that many state courts throughout the country have properly sought to examine the state of mind of the child declarant in evaluating whether a statement is testimonial. The Minnesota Court of Appeals in *State v. Scacchetti*, 690 N.W.2d 393 (2005) held that a three year old child victim's videotaped statements to a nurse were non-testimonial. The Court in *Scacchetti* emphasized the importance of the child victim's cognitive awareness of the consequences of their statements at the time they are being made. The Court stated that "in order for *Scacchetti* to succeed on this argument he must show, under *Crawford*, that the circumstances surrounding the contested statements led the three year old to reasonably believe her disclosures would be available at a later trial, or that circumstances would lead a reasonable child of her age to have that expectation. See *Crawford*, 124 S.Ct. at 1364. *Scacchetti's* arguments fail to show this". *Id at* 396. In another case involving a three year old child abuse victim, State *v. Bobadilla*, 709 N.W. 2d 243, (2006), the Minnesota Court declared that a three-year-old child could not understand the legal processes and consequences of their statements made during a forensic interview.

In a recent Texas Appeals Court child abuse case, *Lollis v. State*, 232 S.W.3d 803 (Tex. Ct. App. Texarkana - Aug. 10, 2007), the Court indicated that "there is no evidence that, from the perspective of the children, the ongoing relationship with Clark was anything but counseling. And that is the proper perspective from which we view the context of the statements". *Id. at* 12. In addition, in the Minnesota

case of *State v. Krasky*, 736 N.W. 2d 636 (Minn. 2007), the Court indicated that "In both *Bobadilla* and *Scacchetti* we noted that it was unlikely that the child complainant knew that the statements could be used at trial against an abuser". *Id. at* 642.

In the Kansas case of *State v. Henderson*, 160 P. 3d 776 (2007) the Court declared that "a young victim's awareness, or lack thereof, that her statements would be used to prosecute, is not dispositive of whether her statement is testimonial. Rather, it is but one factor to consider in light of *Davis* guidance after *Crawford*." *Id. at* 785. The Illinois Court has also spoken to the age of the child in their testimonial analysis in the child abuse case of *People v. Stechly*, 225, Ill. 2d 246, 870 N.E. 2d 333, (Ill. 2007). *Stechly* indicated that

> In accordance with the weight of authority, as well as Professor Friedman's analysis, we believe that the better view is to treat a child's age as one of the objective circumstances to be taken into account in determining whether a reasonable person in his or her circumstances would have understood that their statements would be available for use at later trial. *Id. at* 296.

Clearly, the state of mind of the child declarant at the time the statements are being made is essential to the Court's analysis.

A line of cases involving a child's statements to a medical professional have indicated the importance of analyzing these cases from the perspective of the child. See *State v. Johnson*, 2006 Ohio 5195 (nine year old's statement to medical professional non-

testimonial); *McDonald v. State*, 2006 Tex App. LEXIS 7416 (two year old's statement to a medical professional non-testimonial). The Massachusetts case of *Commonwealth v. DeOliveira*, 447 Mass. 56 (2006) further developed the importance of focusing on the age of the child in the testimonial analysis. The *DeOliveira* Court declared that in the case of a six-year-old's statement to a doctor "a reasonable person, armed with her knowledge could not have anticipated her statements would be used prosecutorially." *Id. at* 56 In the Colorado case of *People v. Vigil*, 127 P.3d 916 (Colo. 2006) the Court declared that a seven-year-old child's statement to a physician should be analyzed using "an objective reasonable person standard." *Id. at* 923.

In the instant case, the ten year old declarant (who presented with a developmental age of seven) could not at the time, due to her tender age, recognize the consequences of any statements that she made to the hospital counselor. The reasonableness of the child's awareness as to the consequences of their statements must be used to evaluate their statements in light of *Crawford*.

This Court should adopt a "reasonable child" standard as the standard utilized in determining whether children's reports of abuse are testimonial.

II. Child development research studies demonstrate that young children do not understand judicial players and processes and, therefore, supports the

adoption of a "reasonable child" standard.[2]

> Research has shown that young children do not understand what court is and, therefore, are unable to understand that statements made in a forensic interview could be used in that forum.
>
> Testifying is anxiety-producing for most adult witnesses. Adults, however, are sufficiently knowledgeable about the legal system to place their testimony in context. Adults understand-at least in general terms-what happens in court and what is expected of them. This knowledge helps adults manage the stress of testifying. By contrast, many children have little idea of what to expect in court. Some young children believe that they will go to jail if they give the 'wrong answer,' or that the defendant will yell at them.

Symposium, Child Abuse: *Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony*, 23 Pacific Law Journal 3 (1996).

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[2] Argument II- child development studies and discussion reproduced from American Prosecutors Research Institute's amicus curiae brief filed with the Supreme Court of Iowa in the matter of *State of Iowa v. James Howard Bentley*, No. 06-1000. Argument II reproduced with permission from author Alice Anna Phillips, former Senior Attorney, American Prosecutors Research Institute.

Below are six of the leading studies evaluating what children understand about court and when they understand certain court-related concepts.

1989 Saywitz Study: "*Children's Conceptions of the Legal System*"

Dr. Karen Saywitz published a study in 1989 that focused on developmental differences in children's understanding of the legal system and what contributes to that understanding. Karen Saywitz, *Children's Conceptions of the Legal System: Court is a Place to Play Basketball, Perspectives on Children's Testimony*, 131-157 (S.J. Ceci, D.F. Ross & M.P Toglia eds., 1989). Forty-eight children (ages four to fourteen) were divided into age groups. Half of the children were actively involved in court cases. The study focused on eight court-related concepts: "court," "jury," "judge," "witness," "lawyer," "bailiff," "court clerk," and "court reporter." All the children were asked questions and shown illustrations of these eight concepts and asked to tell what they knew about the concept. The terms "bailiff," "court clerk" and "court reporter" were removed from the final results as the children in all age groups did not understand those concepts. Surprisingly, children with more actual court experience demonstrated less accurate and less complete knowledge than children with no court experience. The researchers surmised this could be for two reasons. First, children who were involved in court cases may have emotional difficulties that interfere with cognitive abilities because they were from dysfunctional families; and second, actual court experience for children may be confusing and chaotic, thus making accurate knowledge of the system more difficult. The chart

below demonstrates the percentage of children in each age group that showed accurate understanding of each of the eight concepts:

Concept	Age Group 4-7 Years	Age Group 8-11 Years	Age Group 12-14 Years
Court	0.06% accurate	74% accurate	100% accurate
Jury	0% accurate	21% accurate	73% accurate
Judge	0.06% accurate	93% accurate	91% accurate
Witness	0.11% accurate	86% accurate	100% accurate
Lawyer	0% accurate	93% accurate	100% accurate
Bailiff	0.06% accurate	0% accurate	0.09% accurate
Court Clerk	0% accurate	0% accurate	0.18% accurate
Court Reporter	0% accurate	50% accurate	64% accurate

Children between the ages of eight and eleven begin to have a more accurate understanding of the court system and the primary people involved (jury, judge, witness and lawyer), yet are still confused by details and duties. Children age seven-years-old and younger, (testimony in this case this minor child involved in this case though ten years of age chronologically, functioned developmentally as a seven year old), have little to no understanding of the court system's players much less the actual processes contemplated at the time of a forensic

interview. Therefore, under the formulation set forth in *Crawford*, a child functioning at the level of a seven-year-old could not reasonably expect that statements made to an interviewer prior to a medical examination could later be used prosecutorially.

Additional concepts were tested in this study that further demonstrate when children understand court-related concepts. First, all children were asked: "What makes a jury/judge believe a witness?" The children in the older age group were able to identify factors used by judges and juries to determine credibility of witnesses, whereas the four to seven-year-old group assumed witnesses always tell the truth and are believed. Whether the children were in the experienced or non-experienced court group did not affect this result. Second, all children were asked: "How do they [judge/jury] decide who wins the case in court?" The majority of eight to fourteen-year-olds were inaccurate in their overall understanding. They generally believed that judge and jury decision-making are dependent on each other. Some children in this age group believed that the judge and jury discuss the case together and that the judge can change the jury's verdict. Only three children (in the twelve to fourteen age group) understood that the judge and jury were independent from each other. Third, all children were asked the following questions: "What happens when people tell the truth in court? What happens when people tell a lie in court? Why is it important that people tell the truth in court?" Here, awareness was significantly different across age groups, but not across levels of court experience. A majority of the four to seven-year-olds could not demonstrate any

awareness of the court processes of gathering and determining the truth of evidence. Many of these children believed that the court's goal was to "punish the criminal or give the child to one of his parents," rather than understanding the actual goals of collecting, presenting, and evaluating evidence. Further, these children held the naive view that evidence would magically present itself and be automatically believed. This study demonstrates that the child victim in this matter could not reasonably understand or expect that her statements might later be used in a court proceeding.

Overall, this study demonstrated the following for each age group:

(1) Four to Seven Years Olds: As a result of their egocentric view of the world, this group of children understood some features of the legal system, but not any definable features. For instance, some children understood that a judge is there to talk and listen, but did not understand that a judge is in charge of the courtroom or determines a sentence. This group was unable to meet the criteria of accuracy for any of the concepts listed above. These children could describe court-related personnel as sitting, talking, and helping but could not say how these people perform their roles nor differentiate between these varied roles. For example, the children interchanged the roles of court, police, and prison and were confused as to whether judges remain judges when they go home at night. This group also understood that witnesses had to tell the truth, but only thought that witnesses did so

to avoid being punished. Additionally, these children believed that all evidence was necessarily true. The children had blind faith that witnesses tell the truth and, if witnesses themselves, would be surprised by a confrontational cross-examination or repeated interviews which are not consistent with that blind faith. These children further believed that the court process ultimately led to jail and the children could only describe court from the point of view of someone who was in trouble. Since the deceased child in this case was functioning at the level of a seven-year-old, when applying the study to the child victim in the present case, this court can objectively determine that the child victim did not have the cognitive development to know that her statements could be used in court.

(2) Eight to Eleven Year Olds: Children of this group were able to view court as a place to work out disagreements, but still struggled with defining features between juries and judges. However, these children were better able to understand that judges determine guilt or innocence and decide punishment. They also viewed court similar to church ("You have to be quiet and serious"), and that lawyers help people, are on your side (which shows some understanding of the adversarial process), and stand up for you in court (which shows representational awareness). This group of children showed increased understanding of the differing roles of court-related people, the court process and its

function. These children were less likely to confuse the roles of the court and the police. Under the age of ten, children do not understand what a jury does and they still confuse the word with similar sounding words. Between ages eight and eleven, the children studied did not understand that impartial people sit as jurors and instead believed that victims, witnesses, and defendant's friends are on the jury. This group did not understand that the jury decides the outcome of the case.

(3) Twelve to Fourteen Year Olds: This group was able to understand the court process and place it in context with the overall government. At this age, these children became aware of the function of juries, but are still confused about the role of the jury in making decisions. Some children believe that the judge and jury work together to make a decision. This demonstrates that children do not understand the need to communicate to the jury rather than the judge. The children in this group could understand factors that would be considered when determining credibility (such as facial expressions, reputation, personality, comparison with corroborating evidence, etc.).

Based on this study, the child in this matter should not be held to an adult level of cognition that developmentally they are not able to attain. Thus, adopting a "reasonable child" standard in accordance with the research is appropriate when addressing the formulations set forth in *Crawford*.

1990 Saywitz Study: "*Children's Knowledge of Legal Terminology*"

Dr. Saywitz conducted another study, published in 1990, that analyzed whether age and grade-related patterns would be found when testing children on commonly used court terms. Karen Saywitz, Carol Jaenicke & Lorinda Camparo, *Children's Knowledge of Legal Terminology*, 14 L. & Hum. Behav. 523 (1990). Sixty children were grouped according to school grades, given a list of 35 legal terms and asked to tell everything they knew about each word. The study showed that some legal terms had significant grade-related trends. Some terms, which were accurately defined by the sixth graders, were largely inaccurate for the kindergartners, such as: "oath," "deny," "lawyer," "date," "sworn," "case," "jury," "witness," "judge," "attorney," "testify," and "evidence." On the other hand, some legal terms did not have grade-related trends because children in all three groups equally understood or misunderstood the term. Terms that were easy for all groups of children to describe accurately were: "lie," "police," "remember," "truth," "promise," and "seated." Terms that were difficult for all groups of children to describe accurately were: "charges," "defendant," "minor," "motion," "competence," "petition," "allegation," "hearing," and "strike."

The study also considered if the age of the children contributed to whether an unfamiliar word was mistaken for a similar sounding word (i.e., jury was mistaken for jewelry) or whether a word had another meaning outside the court system (i.e., "motion is like waving your arms"). These two types of errors were found to be grade-related insofar as the sixth graders made significantly fewer of these

errors than the third graders or kindergartners. For example, 19 of 20 kindergartners and 18 of 20 third graders erred with the word "hearing," whereas only 7 of 20 sixth graders made the same error. This demonstrated that the older children were able to understand that familiar words may have a different meaning in the court system.

This study demonstrated that "a majority of legal terms tested were not accurately defined until the age of 10." *Id. at* 531. Of interest is that younger children admitted lack of knowledge or unfamiliarity with a legal term more frequently than older children. Thus, older children may answer a question concerning a court term; yet not understand the term or the question. On the other hand, younger children may think that they understand the meaning of the term and may testify accordingly, when in fact they have a different meaning in their mind than the adult does. The study found that younger children (under eight years of age):

> fail to realize that they have insufficient information to correctly interpret the world. At times, they fail to identify and monitor their own limitations as communicators. The younger children's resistance to the prompt, "Could it mean anything else in a court of law?" suggests that they had limited metacognitive ability to foresee that a term would mean something else in a different, potentially unfamiliar, context. Moreover, it may be difficult for them to shift from one context to another or to continue to generate alternate solutions.

Id. at 532. However, by third grade, children may be able to fit familiar terms into a different context, such as a court setting.

This particular study demonstrates that even if a child within the age-frame of this study is informed during an interview that their statements may be used in a court proceeding, this does not necessarily mean that the child understands what court is or what the purpose of court is. On the other hand, if such information is not provided to a child during an interview, it is not fair to expect the child intuitively to understand the function of court or that the interview may be used in a criminal prosecution. In this case, the child was not informed that the interview may later be used in court, and no court-related subjects were discussed.

1989 Warren-Leubecker Study: "*What Do Children Know about the Legal System and When Do They Know It?*"

A study conducted in Australia, published in 1989, researched the developmental trends in children's perceptions of the legal system, court-related personnel, reasons for going to court, and how decisions are made. Amye Warren-Leubecker, Carol S. Tate, Ivora D. Hinton and Nicky Ozbek, *What Do Children Know about the Legal System and When Do They Know It? First Steps Down a Less Traveled Path in Child Witness Research*, *Perspectives on Children's Testimony* 158-183 (S.J. Ceci, D.F. Ross & M.P Toglia eds., 1989). The study involved 563 children ranging in ages two years and nine months to fourteen years in age. The children were asked 23 questions, six of which are included below:

(1) Do you know what a courtroom is? 18% of three-year-olds, 40% of six-year-olds, 85% of seven-year-olds, and up to 100% of thirteen-year-olds answered "yes."

(2) Who is in charge of the courtroom? 82% of the three-year-olds indicated they did not know and the remaining 18% answering incorrectly (i.e., a doctor). Answering the Judge was in charge of a courtroom were 15% of four-year-olds, 25% of five-year-olds, 56% of six-year-olds, 73% of seven-year-olds, and 92% of eight-year-olds.

(3) Who else is in the courtroom (besides the judge)? The chart below demonstrates the percentage of correct answers according to age.

Age in years/Percentage Correct

	3	4	5	6	7	8	9	10	11	12	13
Jury	0	0	3	4	8	13	19	28	38	38	40
Lawyer	0	0	3	0	8	15	31	44	36	40	20
Witness	0	11	3	0	0	28	23	20	16	19	30
Police	0	11	10	26	15	36	26	17	23	34	30
Defendant	0	7	0	0	8	15	19	28	27	21	20
Plaintiff	0	0	0	0	4	8	10	15	19	17	20
Audience	9	0	0	4	4	3	2	4	7	2	20
Bailiff	0	0	0	4	4	0	4	6	9	15	0
Court Clerk/ Reporter	0	0	0	0	0	3	3	11	15	9	0

(4) What does a lawyer do? Children under the age of seven did not know what a

lawyer does. When children reached age ten they began to distinguish between attorneys who prosecute or defend others.

(5) What is the jury and what do they do? A large number of children mistook the word jury for jewelry and were unable to answer this question. In general, it was not until age ten that a significant number of children could understand that a jury is involved in decision-making. However, at age twelve, 30% of these children still did not understand the role of a jury in court.

(6) Why do people go to court? A significant number of younger children did not know or were not able to provide a reason as shown by these percentages: 91% of three-year-olds; 75% of four-year-olds; 62% of five-year-olds; 43% of six-year-olds; 27% of seven-year-olds; 15% of eight-year-olds; and not until age thirteen were all children able to provide an answer.

Of interest with this particular study is that it includes children of the same age as the child victim in the present case. The results above clearly demonstrate that a majority of children age ten and younger do not understand court-related terms, the players involved in court proceedings, the purpose of court proceedings, nor the most basic level of the purpose of court. Again, this study is consistent with the abovementioned prior studies in showing that

until approximately the age of ten years old children do not understand the court process objectively and consequently cannot understand that their out-of-court statements may be used in court.

1989 Flin Study: *"Children's Knowledge of Court Proceedings"*

A study from the United Kingdom, published in 1989, replicated the findings in the studies above. Rhona H. Flin, Yvonne Stevenson, Graham M. Davies, *Children's Knowledge of Court Proceedings*, 80 British Journal of Psychology 285-297 (1989). Ninety children ages six, eight and ten were studied in this project. Twenty legal terms, as well as questions regarding court procedures were asked to the children. Consistent with other studies, the ten-year-old children understood more legal terms than the younger children. Only four terms ("policeman," "rule," "promise," and "truth") did not show a significant difference in accuracy between the age groups. However, terms like "going to court," "evidence," "jury," "lawyer," "prosecute," "trial," and "witness" were clearly not understood by the six and eight-year-old children and only nominally by the ten-year-olds. When asked what kind of people go to court, children ages six and eight did not know or believed that only bad people went to court. However by age ten, these children understood that all types of people could be involved in court proceedings.

1997 Aldridge Study: *"Children's Understanding of Legal Terminology"*

A study of British children ages five to ten, published in 1997, focused on child witnesses'

understanding of the legal system. Michelle Aldridge, Kathryn Timmins, Joanne Wood, *Children's Understanding of Legal Terminology: Judges Get Money at Pet Shows, Don't They?* 6 Child Abuse Rev. 141-146 (1997). This study found that children do not begin to understand what a witness is or what a judge is/does until age ten; none of the children in the study had ever heard the word "prosecution," except for one child who said "prosecution's when you die. You get hanged or something awful like that." In defining what court is, the children studied had the following answers: one five-year-old stated "a court is a sort of jail;" one seven-year-old said that witnesses "whip people when they are naughty;" another seven-year-old said "the police think that witnesses have done something naughty;" and one seven-year-old described a judge as "someone who gets money, like at a pet show."

1998 Berti Study: *"Developing Knowledge of the Judicial System"*

Similar results as the Saywitz (1989), Warren-Leubecker (1989), and Flin (1989) studies were found in an Italian study from 1998. Anna Emilia Berti & Elisa Ugolini, *Developing Knowledge of the Judicial System: A Domain-Specific Approach*, *The Journal of Genetic Psychology* 159(2), pp. 221-236 (1998). One hundred students from Verona, Italy participated in this study. Of particular interest were the student responses to the question about what court is: 75% of first graders (mean age 6.7) did not know; 45% of third graders (mean age 8.6) did not know; 15% of fifth graders (mean age 10.7) did not know; and 5% of eighth graders (mean age

13.8) did not know. In response to describing a public prosecutor, all first and third graders either did not know or had never heard of a prosecutor and only 1 of 20 fifth graders and 4 of 20 eighth graders accurately described a prosecutor. The younger children similarly had difficulty understanding or describing a judge, witness, lawyer, or jury. Of interest in this study is that none of the first and third graders understood that a judge must study law to be a judge, whereas 18% of fifth graders and 94% of eighth graders understood this concept. Therefore, young child witnesses or victims may not understand the role of a judge when testifying.

Overall, results of these six research studies are similar; each indicates that children under the age ten and under do not comprehend legal terms, the nature or process of court proceedings, or the individuals involved in court proceedings. As such, how could a child functioning at the level of a seven-year-old independently conclude that her statements made during an interview would later be introduced in a court proceeding. She could not.

When determining whether a young child under the age of ten understands that statements made during any interview may subsequently be used in court, these studies demonstrate that an objective person (i.e., adult) standard cannot be applied to young children, especially children as young as the child victim in this matter. Instead, the above research amply supports the creation of a "reasonable child" standard in determining whether out-of-court statements by children are testimonial in light of the *Crawford* decision.

In this particular case, the ten-year-old child, functioning at the age of seven, could not cognitively or developmentally understand that statements made to an interviewer, prior to a medical examination, would be used in court in lieu of her live testimony. Although no governmental agent (police or child protection investigator) was involved in interviewing the child and taking her statement, this Honorable Court must also take the next step, as required by *Crawford*, and address whether an objective person in the declarant's position as a child reasonably understood that the statements made to the interviewer would later be used prosecutorially. In this case, and with children age ten and under, the answer is clearly no. This factor cannot be satisfied since children of this tender age cannot cognitively or developmentally understand legal concepts or terminology.

The studies above demonstrate that children at this developmental infancy are only beginning to obtain characteristic understanding of the legal system and do not advance to an understanding of the defining features until they are older. Moreover, according to the Saywitz studies, the shift from a child's understanding of characteristic features (i.e. a judge is an older person in a black robe) to defining features (i.e. a judge is the person in charge of procedures and enforcing the rules of the court) occurs at varying points in time for different legal concepts. There is not a set age at which every child will understand the defining features of a single concept, nor is there a set age at which one child will understand the defining features of all concepts. As a result, the formulation in *Crawford*

that an objective declarant must reasonably expect her statement to be used prosecutorially in order for it to be deemed testimonial fails in this particular matter. Accordingly, the statements of the deceased child victim to the interviewer are non-testimonial under *Crawford* and should be allowed in at trial.

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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